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Fire, Metaphor, and Constitutional Myth-Making

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ABSTRACT

From the standpoint of traditional legal thought, metaphor is at best a dash of poetry adorning lawyerly analysis, and at worst an unjustifiable distraction from what is actually at stake in a legal contest. By contrast, in the eyes of those who view law as a close relative of ordinary language, metaphor is a basic building block of human understanding. This article accepts that metaphor helps us to comprehend a court's decision. At the same time, it contends that metaphor plays a special role in the realm of constitutional discourse. Metaphor in constitutional law not only reinforces doctrinal categories, but also promotes acceptance of interpretive prerogative and creates sustainable constitutional subcultures, with their attendant myths, counter-narratives, hero figures and villains, and sacred mantras. It links citizens to governing institutions, and bridges diverse communities of interest. Metaphor is bound up with the motivations of the Justices and the development of legal doctrine, and marks the steady ascendancy of the Supreme Court to the center of cultural and legal life.

To illustrate these themes, the article examines the appearance of the fire metaphor and fire-inspired legal sayings in the Court's free expression rulings over time, drawing on the work of cultural anthropologists, legal theorists, and cognitive linguists. Launched in early speech decisions involving socialist ideology, and reinvented in more recent cases involving cross-burning and the Internet, the fire motif has a long pedigree. By tracing the Court's invocation of fire across the decades, we can uncover a wealth of information about the interaction between rule and myth, legal doctrine and symbol. Born in the early part of the twentieth century during turbulent times, the fire metaphor has enjoyed an integral role in the construction of our free speech folklore. Across historical epochs and amid social upheavals, it has alternately collaborated with and jousted with other free speech metaphors and icons. The curious life of this remarkable, though often overlooked, language composition tells us much about the institution of the Court, our modes of constitutional discourse and myth-making, and the interactive nature of legal change.

INTRODUCTION

> Now I will do nothing but listen,
> To accrue what I hear into this song, to let sounds
> contribute toward it.
> I hear bravuras of birds, bustle of growing wheat, gossip of
> flames, clack of sticks cooking my meals . . .
> The ring of alarm-bells, the cry of fire, the whirr of swift-
> streaking engines and hose-carts with premonitory
> tinkles, and colour'd lights.**

We learn as young children that fire can hurt us. It can burn our body and lay waste to our home. It is at once terrifying and alluring, intense and blinding.[1] In some quarters, particularly those influenced by our rich religious traditions, fire represents judgment, fidelity, and endings.[2] Yet even as fire has the capacity to destroy, it can also give life, sparking knowledge or creativity; signaling passion; or guiding us in our hour of need. The enduring image of fire—as well as our fascination with and understanding of its manifold characteristics—permeates our daily lives, flickering in and out of everyday language.

Since time immemorial, mankind has entwined fire, mythology, and law to build community, to legitimate cultural institutions, and to inspire the populace. In native traditions, fire is seen as the source of mankind's secrets and its collective identity. According to an ancient legend, the wise men and lawgivers of the Seminole Nation decreed that fire would be forever protected by the law, for fire "is part of our being. . . . [It] is sacred. It is alive."[3] The precepts of sacred law required fire to be honored each year through the sacrifice of the first felled deer. It was believed that this ceremonial act would ensure a successful hunt and result in the healing of the sick and the forgiveness of the past season's transgressions.

As native law demanded that fire be ritually sustained to secure its blessings, so our governing institutions today "feed the fire and keep [it] alive" in

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** WALT WHITMAN, *Song of Myself*, *in* LEAVES OF GRASS 62 (1921).

1. Thus, the popular Anglo-American aphorism, "A burnt child fears the fire." GREGORY TITELMAN, AMERICA'S POPULAR SAYINGS 32–33 (2d ed. 2000) (explaining that this proverb, circulating in its current form since 1580, conveys the sense that "experience teaches caution").

2. As one might expect, the fire metaphor is entwined with our religious traditions, sayings, and tales. On fire as fidelity, see Deuteronomy 4:24 ("For the Lord your God is a consuming fire, a jealous God.") and Psalms 79:5 ("How long, O Lord, Will You be angry forever? Will Your jealousy burn like fire?"). On fire as knowledge: Exodus 3:2 ("The angel of the Lord appeared to him in a blazing fire from the midst of a bush; and he looked, and behold, the bush was burning with fire, yet the bush was not consumed."). On fire as judgment: Daniel 3:6 ("But whoever does not fall down and worship shall immediately be cast into the midst of a furnace of blazing fire.") and Revelation 20:15 ("And if anyone's name was not found written in the book of life, he was thrown into the lake of fire."). On fire as rebirth: Matthew 3:11 ("He will baptize you with the Holy spirit and fire.").

3. JACK GREGORY & RENNARD STRICKLAND, *Feeding of the Spirit of the Sacred Fire*, *in* CREEK SEMINOLE SPIRIT TALES: TRIBAL FOLKLORE, LEGEND AND MYTH 17 (1971).

constitutional culture.[4] When our primeval awareness of fire's properties is tapped by the United States Supreme Court in metaphorical ways to talk about juridic authority, the image acquires newfound texture and luminescence. At that brilliant moment, fire in all of its dimensions—as omnipresent danger, as life force, as the urgent demand upon our energies—becomes enmeshed in the institutional motivations, functions, and reputation of the government entity as speaker. As the new mixes with the old, and as popular culture mingles with the apparatus of the law, possibilities are opened for the power of language. Vibrant images become implements of judicial authority; pithy aphorisms mutate into legal mantras solidifying the stature of the judiciary in our collective imagination.

I call this social process *constitutional myth-making*, whereby potent metaphors, symbols, scripts, and mantras are constructed and disseminated by individuals and institutions to create legal meaning. Its raw materials consist of legal lore and doctrinal infrastructure, as well as folk belief systems and ordinary experiences. As process, it operates synthetically and symbiotically, both drawing from and fortifying the formal system of higher lawmaking.

This Article bears witness to the waxing, waning, and remarkable resurgence of fire-based metaphors and legal sayings in free speech mythology. Prominent sayings in the First Amendment canon that depict fire as a theme range from the renowned pro-regulation statement, "falsely shouting fire in a crowded theater," to liberty-enhancing quotables such as "men feared witches and burnt women" and "burning down the house to roast the pig." Extended metaphors alternately portray expression "sparking" protracted social strife or speech regulation "torching" the legal order.

Much has been written about the genesis and endurance of the "marketplace of ideas" metaphor in the First Amendment canon.[5] By contrast, very little scholarly attention has been paid to the Court's systematic use of fire imagery in free speech jurisprudence or, more broadly, to the power of this rhetorical device in imparting legal ideology.[6] This is unfortunate.

In seeking to restore fire's place at the forefront of our understanding of constitutional culture, I heed Benjamin Cardozo's trenchant warning that "meta-

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4. *Id.*

5. *See, e.g.*, Cass Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995); David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984); Ronald Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 834 (1974). The strange career of this metaphor is interwoven with that of the fire metaphor. I take up that theme in Part V.

6. For commentary on the Court's startling use of fire imagery in *R.A.V. v. City of St. Paul*, see, for example, BENJAMIN BAEZ, AFFIRMATIVE ACTION, HATE SPEECH, AND TENURE 37 (2002); JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 52–65 (1997); or on the fire metaphor in the wartime speech decisions, see, for example, Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's 'First Freedom,' 1909–1931*, 40 WM. & MARY L. REV. 557, 591 (1997); Mark Kessler, *Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger*, 27 LAW & SOC'Y REV. 559, 581 (1993); Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 838-39 (1984) .

phors in law are to be narrowly watched,"[7] but for a somewhat broader set of reasons. Tracing the evolution of fire hones our perspective of law and culture in three respects. First, analysis of these recurring linguistic-cultural tools reveals why fire-based language is uniquely effective in influencing constitutional actors. Second, observing the formation of a free speech ethos in intimate fashion allows us to gain valuable insight into how metaphor can cement or dissolve existing doctrine across time. Third, once attention is refocused on fire's integral role in shaping our free speech belief system, we should arrive at a better appreciation for the relationship between constitutional language and institutional self-conception.

In this instance, fire has left its mark by serving as a ready implement of bureaucratic influence and by reflecting the Supreme Court's rise to the apex of the socio-legal order. The Justices' historical usage of fire-inspired language has not only left a rich rhetorical legacy, it has also bequeathed a disturbing ethos of *judicial centrality*. According to this model of law, courts serve as the privileged originators of constitutional norms, and the legal system functions as the hub around which other American institutions orbit. In recent times, the myth of fire has fostered this school of thought.

What follows is not a full-length treatment of free speech metaphors, but a brief history of the semiotics of fire. My quest to rediscover the legal myth of fire unfolds in five stages. Part I lays out, on the one hand, the skeptical view of metaphor shared by traditional legal scholars, and on the other, the enthusiastic embrace of metaphor by the law-as-language movement. Negotiating a line between these two perspectives, this Part of the Article makes the case for an understanding of metaphor that is essential to the constitutional lawmaking process: as a rhetorical device that mediates the relationships between citizen and governing institutions.

Parts II through IV are organized according to three "metaphorical fields," where historical happenstance, value systems, and rhetorical strategy have converged to produce distinct thematic structures in the development of the language of fire.[8] A high degree of linguistic coherence permits the constitutional record to be separated into three discrete eras: (1) 1919 until the Second World War; (2) the transitional period in the decade following the War; and (3) the late 1950s to the present. Part II discusses the composition of fire metaphors and legal sayings, which were introduced into the cultural soil just after the turn of the twentieth century. As deployed in these wartime decisions, the rhetoric of

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7. Berkey v. Third Ave. R.R. Co., 155 N.E. 58, 61 (N.Y. 1926). The full quotation is: "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Id.*

8. *See* VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS 17 (1974) (defining fields as "abstract cultural domains where paradigms are formulated, established, and come into conflict"); Jeremy Rayner, *Between Meaning and Event: An Historical Approach to Political Metaphors*, 32 POL. STUD. 537, 549 (1984) ("The structure of a field is the outcome of a series of contests fought in metaphors.").

fire treated speech as a threat to our psychological well-being. Invoking the heroic myth of the firefighter, the Supreme Court consistently wrapped the state's criminalization of political expression in a cloak woven of bravery, selflessness, and adulation.

Once unleashed in the law, fire-based language provided grist for the creation of new signs and images in speech culture. Part III tracks the developments in the fire motif in the aftermath of World War II, during which time the Court harnessed the fire metaphor to enable a national anticommunism policy. Later, the Justices started to experiment by stirring race into the combustible mixture as a method of legitimating judicial noninterference in other forms of speech regulation.

Part IV examines the Court's reconfiguration of the legend of fire in the last generation so as to spin a new web of meaning, one that has expanded the realm of protected expression even as it has enhanced the role of the judiciary in American life. In our own era, it is speech regulation rather than inflammatory expression that threatens to set our constitutional order ablaze. The despised role of arsonist, previously played by the citizen-speaker on the street, is ably filled by the state. The leading role of firefighter, once acted by the state, is now performed by the Court itself. Advocates, judges, and intellectuals have contributed to the dissemination of the new legal myth of fire.

Part V closes the Article by tackling three topics. First, it offers explanations for the ascendancy of the marketplace and the decline of fire as the dominant constitutional metaphor. Second, it strives to deepen our understanding of metaphor as an indispensable link between legal mythology and popular culture. Third, the discussion suggests that we should be watchful of metaphors that reinforce jurists' view of themselves as the primary guardians of the legal order.

I. LANGUAGE AND ITS DISCONTENTS

A. METAPHORICALLY SPEAKING . . .

Metaphor has long occupied an uncertain place in the law. Legal scholars have traditionally understood metaphor as, at worst, a perversion of the law, and at best, a necessary but temporary place-holder for more fully developed lines of argument. On this view, metaphors are vague and inherently manipulable, appealing to base instincts, whereas explicit legal argumentation represents the rigorous, authentic core of law. Jeremy Bentham had one of the most extreme reactions, viewing fiction as a "pestilence" in the law, a "syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness."[9] To Bentham, "Metaphors are not Reasons,"[10] but the antithesis of law.

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9. 1 JEREMY BENTHAM, WORKS at 235, V, at 92 (1843). Or, as Bentham exclaimed at another point, "What have you been doing by the fiction—could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie: if yes, a foolish one. Such is the dilemma. Lawyer! Escape from it if you can." 3 BENTHAM, *supra*, at VIII, at 283. Many commentators have since followed suit,

It is easy to appreciate why metaphor was so difficult to square with the program of either the formalist or the legal realist. To the formalist, metaphor seemed impossible to pin down, entirely unpredictable. To the realist bent on uncovering the social policies exerting a "gravitational field [upon] any rule or precedent" and nudging the law in those general directions, metaphor appeared to be just another distraction.[11] As Cardozo warned ominously, "[S]tarting as devices to liberate thought, [metaphors] end often by enslaving it."[12]

Lon Fuller's writings exemplified this deep unease with metaphor.[13] Fuller was attentive to form, but he also embraced a purposivist approach to the law that often mirrored that of the legal realists whose work served as a foil for his ideas.[14] In his classic work, *Legal Fictions*, Fuller ruminated over not only "the typical legal fiction," but also over "more subtle and less obvious kinds of fictions,"[15] including legal metaphors. Although Fuller exhibited somewhat less hostility to metaphor than his forebears, he nevertheless preferred to treat metaphors "as servants to be discharged as soon as they have fulfilled their

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urging legal thinkers to resist the lure of metaphor. *See, e.g.*, Thomas Morawetz, *Metaphor and Method: How Not to Think About Constitutional Interpretation*, 27 CONN. L. REV. 227 (1994); Koffler & Gershman, *supra* note 6, at 838 (suggesting that metaphors cover up weak justifications or unproven acts). Departing from this trend, a number of contemporary legal thinkers have found value in metaphor. *See, e.g.*, MILNER BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY 25-28 (1985) (urging us to think of the law in terms of water and the hydrologic cycle rather than as bulwark against the unknown and undesirable); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395 (1986) (offering favorable account of metaphor in antitrust law); Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229 (1994) (identifying a trend toward aural metaphors in law); Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779 (2001) (advocating use of multiple metaphors in corporate law to better illuminate law's various dimensions); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1077 (1989) (arguing that metaphor encapsulates legal contradictions).

10. JEREMY BENTHAM, THE THEORY OF LEGISLATION 69 (C.K. Ogden ed., 1931); *see also* RICHARD A. COSGROVE, SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART 56 (1996) (pointing out that Bentham criticized Blackstone's resort to metaphor and allusion).

11. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 834 (1935). Cohen explained his concern about metaphor in this way:

> When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.

Id. at 812.

12. Berkey v. Third Ave. R.R. Co., 155 N.E. 58, 61 (N.Y. 1926). I do not wish to be misunderstood. My own view of metaphor is closer to that of the legal realist than the formalist or the critical legal scholar, though I believe that the realists failed to appreciate the full import of metaphor in legal culture.

13. *See e.g.*, LON L. FULLER, LEGAL FICTIONS (1967).

14. *See* James Boyle, *Legal Realism and the Social Contract*, 78 CORNELL L. REV. 371 (1993) (arguing that Fuller was not an anti-realist, but embraced a functional approach to law that was anti-conceptualist).

15. FULLER, *supra* note 13, at 5. A legal fiction, Fuller explained, is neither a truthful statement nor a lie, for it is deployed without intent to deceive but instead with full knowledge of its incompleteness.

function."[16] For "[w]hen all goes well and established legal rules encompass neatly the social life they are intended to regulate," he wrote, "there is little occasion for fictions."[17]

Unabashed disdain for metaphor has even afflicted modern constitutional scholarship. Stephen Carter, for example, has described the wall of separation of church and state as "only a metaphor, although we sometimes pretend it is a part of our constitutional law."[18] His implication is obvious: metaphor is inconsistent with the function of law.

One can detect a touch of elitism in intellectual hostility toward metaphor. After all, metaphors are drawn from common experiences, whereas doctrinal analysis is prized as the enlightened product of arduous tutelage and practice by legal specialists. But professional wariness of simplicity, and a preference for doctrinal form, should not prevent us from a deeper engagement with metaphor's place in constitutional culture.

This deeply held understanding of metaphoric communication as a distasteful habit from which jurists must be weaned has been forcefully challenged in recent years by theorists and empiricists who recognize law as a close cousin of ordinary language. Where the legal thinker has considered metaphor as little more than "scaffolding" to be dismantled from the analysis once the conceptual structure is complete,[19] the linguist and anthropologist find metaphor to be a building block in the communicative process.[20] At a basic level, they tell us, metaphors allow human beings to understand one phenomenon in relationship to another and to illuminate some salient details while shading others. In doing so, they order our social world by weaving new events into stock scenes and everyday occurrences.[21]

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16. *Id.* at 121. Drawing upon the work of the German philosopher Hans Vaihinger, Fuller argued that legal fictions were akin to analytical crutches employed in the discipline of mathematics: they are like incomplete assumptions in an equation that "must be dropped from the final reckoning." *Id.* at 121.

17. *Id.* at viii.

18. Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 CAL. L. REV. 1059, 1063 (1999).

19. FULLER, *supra* note 13, at 70–71.

20. Classical rhetoricians long ago accepted that the discipline of rhetoric includes the pithy deployment of metaphor. Aristotle defined metaphor as a witty, vivid analogy that "produces understanding and recognition through the generic similarity" when it is used to season a speech. ARISTOTLE, THE ART OF RHETORIC 235 (H.C. Lawson-Tancred trans. 1991); *see also* GERARD A. HAUSER, INTRODUCTION TO RHETORICAL THEORY 3 (1986) (defining rhetoric as "the management of symbols in order to coordinate social action"); GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 407, 415 (1987) (describing metaphor as the key to unlocking folk theory and entrenched cultural categories). More ambitiously, according to George Lakoff, "[t]he basic claim of experiential linguistics is this: A wide variety of experiential factors—perception, reasoning, the nature of the body, the emotions, memory, social structure, sensori-motor and cognitive developments, etc.—determine in large measure, if not totally, universal structural characteristics of language." George Lakoff, *Linguistic Gestalts*, *in* PROCEEDINGS OF THE 13TH ANNUAL MEETING OF THE CHICAGO LINGUISTIC SOCIETY 236, 237 (1977).

21. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 157 (2003) (arguing that metaphors "have the power to define reality . . . through a coherent network of entailments that highlight some

At this juncture of the debate, detractors usually insist that while metaphors are tolerable in everyday conversations, they are misleading in legal decision-making because of their imprecision. But there is nothing uniquely transparent about doctrinal argumentation—it strives to be open and deliberate, but remains just as often opaque or unfinished. Highlighting and shading are features of both doctrinal analysis and metaphoric persuasion. Metaphor, like legal argumentation, has the power to draw and deflect attention; to stimulate or retard conversation; to favor one or another aspect of a legal contradiction.[22]

Critics who complain that one simply cannot argue with metaphor have a simplistic view of the language tool's operational features. Metaphors have identifiable structure, with replaceable parts.[23] For every metaphor that finds purchase, the same metaphor can be reconfigured and redeployed or an alternative metaphor designed. We should certainly remain attentive to judicial use of metaphor, but this is no less and no more than we should do for propositional argument and the manipulation of precedent for normative goals.

Not only is metaphoric reasoning inescapable, we should not wish to eradicate it from constitutional discourse even if we could. It plays a central role in the cultivation of constitutional culture and institutional influence, two phenomena essential to the vitality of law. Darting between social and legal domains, metaphor does more than just draw or deflect a reader's attention. It triggers powerful, recurring frameworks of meaning and patterns of belief, and it sets in motion deeply rooted folk images, archetypes, and story lines.

When this occurs, the rhetorical device can either reinforce or unsettle existing doctrinal categories. A metaphor might increase the tensile strength of prevailing legal categories and rules by adding an overlay of common experience or cultural myths. A counter-metaphor can dissolve existing doctrine by positing an alternative configuration of the same material or by packaging different cultural resources in the name of legal change. Once they are set free, metaphors become tenacious carriers of legal meaning.

Rather than a symptom of "a pathology in the law,"[24] then, the presence of active metaphors indicates a healthy legal culture. Metaphor is a naturally occurring language composition that fosters interpretive or imagined communities by linking lawyer to layman and ruling institution to citizen.[25] Constitu-

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features of reality and hide others"; *see also* STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE AND MIND 16 (2001).

22. Critiquing Randall Kennedy's use of the pool metaphor in speaking of minority teaching applicants, Richard Delgado once suggested that critical legal scholars' metaphors "are meant to stimulate, not contain, debate." Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1876 (1990). Whatever the user's intention, however, every metaphor illuminates some salient facts while simultaneously excluding other possibly relevant details.

23. *See* LAKOFF & JOHNSON , *supra* note 21, at 77-78, 87-96; LAKOFF, *supra* note 20, at 246-47.

24. FULLER, *supra* note 13, at viii.

25. Benedict Anderson's famous study, *Imagined Communities*, explored the ways in which vernacular and official languages have tied whole peoples to create the phenomenon of nationality. BENEDICT ANDERSON, IMAGINED COMMUNITIES (1983). A number of critical thinkers have referred to interpretive

tional metaphors, like legal symbols and judicial mantras, allow jurists to address many different audiences at once, and to do so at different levels simultaneously. While the finer points of legal argumentation are aimed at specialists who are adept at recognizing their form and evaluating their presentation, metaphor has the capacity to convey meaning broadly and instantly by drawing upon general experience.

Metaphor is every bit as systematized as doctrinal argumentation, but it operates on a different level, engaging us in more free-form, visual, cognitive, and emotive terms.[26] Visceral and compact, the language device dusts off well-loved stories, common human experiences, and transformative events, enlisting them in the construction of meaning.

B. CONSTITUTIONAL LAW AS PERFORMANCE ART

In order to fully appreciate the role of metaphor in constitutional lawmaking, however, it is not enough to accept law as just another variety of ordinary speech. John Brigham, an early and influential proponent of a linguistic approach to interpretation, fell into this trap by perpetuating an ideal of the independent jurist as orator. Brigham argues that while there is more at stake when it comes to constitutional law, this "does not provide a basis for claiming that the symbolic processes operate any differently."[27] A judge, Brigham contends, can "make an infinite number of new sentences from [existing] grammatical patterns."[28] This theme of the individual judge as rhetorician similarly characterizes the portrait of law drawn by Steven Winter, whose project is to lay bare the basic "infrastructure of legal reasoning."[29] Accordingly, Winter's discussion of the World War I speech decisions centers almost entirely on the fact that jurists employed "entirely conventional conceptual metaphors."[30]

But undue emphasis on linguistic possibility or the basic units of language can leave us with an oddly unmoored sense of legal discourse—law comes across as an endless process of word play. The great contribution of language theory is its capacity to illuminate the humanistic qualities of the law. Yet taking

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communities as a prerequisite to judicial decisionmaking. *See, e.g.*, Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984) (contending that members of interpretive communities are characterized by the impulse "to ask different questions, to consider different bodies of information as sources of evidence, to regard different lines of inquiry as relevant or irrelevant, and, finally, to reach different determinations of what the Constitution 'plainly' means"); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982) (describing such a community as one bound by belief in rules that are authoritative). My own view is that constitutional vernacular and mythology bind Americans such that "in the minds of each lives the image of their community." ANDERSON, *supra*, at 6 (1983).

26. *See generally* Robert L. Tsai, *Speech and Strife*, 67 LAW & CONTEMP. PROBS. 83 (2004).

27. JOHN BRIGHAM, CONSTITUTIONAL LANGUAGE: AN INTERPRETATION OF JUDICIAL DECISION 62 (1978). *See also* Mark Johnson, *Law Incarnate*, 67 BROOK. L. REV. 949, 950 (2002) (describing law as an utterly human project, "embodied and imaginative").

28. BRIGHAM, *supra* note 27, at 114.

29. WINTER, *supra* note 21, at xiii.

30. *See id.* at 272. Winter's work is deeply rooted in modern philosophy of language, recent developments in cognitive theory, and "ordinary language use." *Id.* at xv.

the insights of linguistics seriously requires us to better account for the ways in which constitutional discourse departs from the patois of the street.

It behooves us to leaven language theory with a healthy dose of institutional practice over time. After all, law is fundamentally a collective enterprise. The goals that motivate constitutional actors and the conventions that constrain them are not entirely congruent with those of the average speaker, and these differences are central, not peripheral. Unlike the individual orator, government speakers are ever navigating between disagreement and outright defiance, and searching for bureaucratic advantage.[31] Whether it is culled from everyday experience or plucked from legal lore, metaphor advances visions of interpretive prerogative and of institutional arrangements.

Furthermore, the twin impulses of constitutional actors to synthesize and recycle existing legal forms—prompting Cardozo to describe judicial decision-making as "bricklaying"[32]—exert much influence over the course of legal language, resulting in lasting patterns of sedimentation. This is as true of the construction of legal iconography—the metaphors, scripts, and other symbolic forms of law—as it is of the establishment of legal rules.[33] As I hope to show, the metaphorical fields that nurtured the myth of fire were far more stable than the explanation that law-as-ordinary-language often presents. Originality and spontaneity certainly had their place, but usually in the interstices of ingrained rhetorical practices. Individual displays of rhetorical ingenuity meant little unless and until others were ready to embrace linguistic innovation.

Above all, the concept of time introduces complexities into the connection between language and law by moving analysis beyond the theoretical freedom of the lone jurist as rhetorician toward the actual patterns of historical practice. As Jed Rubenfeld puts it, "Freedom cannot exist here and now; it is always, itself, a thing of the past and future."[34] Training our eyes on the collective usage of metaphor *over time* will allow us to unearth the elusive trends and drifts in our continuing discourse about freedom. It also provides us with clues as to the limits of legal language—the circumstances under which certain rhetorical tools are at their persuasive peak, and when and why the same devices lie in dormancy only to reawaken transformed.

Indeed, it might be fruitful to think of constitutional law less as ordinary language or literature and more as a species of performance art. Eschewing a purely literary approach to the law, Jack Balkin and Sanford Levinson have

31. *See, e.g.*, JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 70, 95–96 (1985) (pointing out that "legal text is authoritative in a different way than a literary text": it is more procedural in orientation and self-consciously demands obedience).

32. *See* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (8th ed. 1985).

33. *See* Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2037 (1996) (emphasizing legal decision makers' institutional impulses to coordinate, integrate, and strive for consistency).

34. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 88 (2001).

offered three benefits of this methodology.[35] First, theater best captures the multivocal nature of law, both in terms of the sophisticated and simple audiences involved, and in the multiplicity of institutional roles that make up the American form of self-government.

Second, this modality underscores the fundamentally public nature of law, which strives to ascertain and disseminate shared socio-legal values. When one encounters epic decisions like *Casey*[36] or *Gideon*,[37] or even slightly less monumental fare, it is impossible to miss the resonant judicial voice: declarative, intent upon engaging the American populace, sometimes more imposing than deliberate. But whatever tone is struck by the Justices, we watch our governing institutions stage the meaning of our commitments, and we naturally mimic their expressive acts.

Third, the theater analogy appropriately treats text as one source among many, like a screenplay or musical score, rather than as the entirety of the process that is law. For interpretation is not simply a matter of silently reading a long-dead author's lines. Even as a premium is placed on fidelity, there is room for creativity in our engagement with the past. It is this possibility of revival and re-invention that encourages citizens to abide by commitments to which they were not parties. Collapsing performance into text would destroy law's capacity to inspire a feeling of ownership in the process of self-rule.[38]

Additional advantages to thinking of law in this fashion reveal themselves. The historian Michael Kammen has insightfully described legal legitimacy as a "psychological phenomenon."[39] Theater best captures the important ways in which culture fosters psychological ties that bind, situate, and inspire us as constitutional players. This model embraces the decidedly ritualistic nature of the intricate dance over constitutional authority, sensitizing us to its unique yet recurring rhythms, shuffles, and change-overs.

Recognizing that all the world is a stage does not require us to conclude that law masks a gloomy reality in which the citizenry is simultaneously entertained,

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35. J.M. Balkin & Sanford Levinson, *Law as Performance*, *in* LAW AND LITERATURE 729 (Michael Freeman & Andrew D.E. Lewis eds., 1999); *see also* Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 207 (1990) (arguing that a legal writer "moves on a stage of perceived boundaries, compelled narratives, and inevitable decisions"); Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991); Gretchen Sween, Note, *Rituals, Riots, Rules, and Rights: The Astor Place Theater Riot of 1849 and the Evolving Limits of Free Speech*, 81 TEX. L. REV. 679 (2002) (arguing that the 1849 theater riot in New York tested the boundaries of free speech law in "ritualized space"). Victor Turner is another theorist who has emphasized that social drama is not purely textual, but contextual experience. *See* VICTOR TURNER, THE ANTHROPOLOGY OF PERFORMANCE 28 (1988).

36. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

37. Gideon v. Wainwright, 372 U.S. 335 (1963).

38. *See* Edward L. Schiefflin, *Problematizing Performance*, *in* RITUAL, PERFORMANCE, MEDIA 194, 198 (Felicia Hughes-Freeland ed., 1998).

39. MICHAEL KAMMEN, PEOPLE OF PARADOX 32 (1980).

misled, and oppressed.[40] Indeed, this vision of law as shadow puppetry is deeply ahistorical. Since time immemorial, humanity's collective actions and shared values have provided inspiration for the ways in which we "construct [our] lives in the act of leading them."[41] And as a matter of theory and fact, the American people have always been both audience and actors.[42]

According to a performative model of higher lawmaking, language is not the beginning and end of law. Instead, it serves as a crucial network of signals and connections. Through customary practice punctuated by moments of improvisation, language cues legal actors to play particular roles, sets the parameters for doctrinal possibilities, and facilitates social cooperation. And unlike ordinary speech, which is so often enlisted in the service of tidy resolutions here and now, law is in a perpetual state of dramatization. Once constitutional meaning is enacted, the dance often stimulates creative movements and novel language templates, and opens previously unimagined vistas for both substantive law and the Court's place in American life. The show always goes on.

II. THE EARLY MODERN DECISIONS: FIRE BECOMES MODULAR

Acknowledging the theatrical qualities of constitutional lawmaking allows us to grasp the full range of metaphor's import, for embedded within metaphor are roles for legal actors, scripts, stage directions, and stock scenes so that the full, commanding meaning of constitutional prerogative may be acted out for the world to behold. All of this is reflected in the curious journey of the fire metaphor in Supreme Court opinions interpreting the First Amendment.

According to the dominant account of the First Amendment, the freedoms we enjoy today are a product of a seamless progression of rules that have become increasingly precise through the benefit of wisdom and practice:[43] the "bad tendency" standard first established in the wartime decisions was replaced by the intent-and-advocacy formulation,[44] which in turn culminated in the "clear and present danger" test.[45] But few of these legal standards would have been

40. *See* Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1086 (2002) (describing critical legal studies as a movement that casts champions of neutrality, objectivity, and universality in "the proverbial position of the Wizard of Oz").

41. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 16 (1983).

42. I do not mean to suggest that citizens have been audience and actors in equal measures at any particular historical moment, or that all citizens have had an equal role in governance. Either claim would be patently false. Rather, I mean simply that the American experiment of locating sovereignty ultimately in the People has guided our governing practices and continues to shape our destiny, which remains—as always—contested.

43. For example, after tracing the doctrinal development of First Amendment law, Henry Abraham and Barbara Perry conclude that the clear and present danger test protects freedom of expression "to the greatest degree humanly feasible under the Constitution." HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT 217 (7th ed. 1998). Harry Kalven described *Brandenburg v. Ohio* as "the end of the story" when it comes to the law governing subversive advocacy. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 121, 227 (Jamie Kalven ed., 1988).

44. Dennis v. United States, 341 U.S. 494, 583 (1951).

45. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

possible if not for the parallel emergence of potent free speech mantras and metaphors. Indeed, in mapping the dips and rises in First Amendment iconography, it quickly becomes apparent that a number of important language devices leapt to life well before each instance of doctrinal innovation.

The drama of our nation locked in armed conflict and ideological struggle in the early part of the twentieth century captivated every sector of American society, giving rise to what the anthropologist Victor Turner called a "liminal" moment between social paradigms.[46] Such transitional periods of disjunction, according to Turner, are moments of possibility, where scenes of experimentation are played out and grammar becomes irrevocably altered.[47]

As governing elites grappled with the wild social forces generated by this crisis, they released into the cultural ecosystem new ways of talking and thinking about our foundational commitments. Arising from a period of intense social disharmony,[48] the fire-as-expression motif was given life in three decisions addressing the extent to which the First Amendment protected Socialist views: *Schenck v. United States*,[49] *Frohwerk v. United States*,[50] and *Gitlow v. New York*.[51]

Judicial pursuit of this rhetorical strategy in early free speech cases—roughly the period starting in 1919 and lasting well into the 1940s—was characterized by several trends. First, constitutional actors consistently, almost obsessively, equated speech with fire or imagistically enveloped legal discourse in flames. There was a remarkable level of juridical consensus on this point: Justices both in the majority and the dissent accepted this legal-linguistic framework as that through which all First Amendment controversies should be discussed, resolved, and accepted by others.

Second, the Justices nearly always called upon the fire-speech link to underscore the negative possibilities of speech and to legitimate the state's power to preemptively arrest these developments before they ever materialized. The result was to paint a chaotic world in which untrammeled expression had its way—a vision too frightening to contemplate for long, much less to tolerate.

Third, this metaphor had broad-based cognitive force not only because of citizens' experience with fire in daily life—an important source of the visceral

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46. TURNER, *supra* note 35, at 33; *see also* TURNER, *supra* note 8, at 52 (defining liminality as "the state of being in between successive participations in social milieux dominated by structural social considerations").

47. *See* TURNER, *supra* note 35, at 24.

48. As Turner explains, social dramas are "units of aharmonic or disharmonic process, arising in conflict situations." TURNER, *supra* note 8, at 37.

49. 249 U.S. 47 (1919). *Schenck* was one of four cases, including *Debs v. United States*, 249 U.S. 211 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Abrams v. United States*, 250 U.S. 616 (1919), that tested the constitutionality of the Espionage Act of 1917.

50. 249 U.S. 204 (1919).

51. 268 U.S. 652 (1925). Ironically, *Gitlow* was the first case to take seriously the proposition that the First Amendment imposed limits on the states by operation of the Fourteenth Amendment. *Id.* at 666.

sensations associated with this language device—but also because of contemporary experiences with war abroad, dissent and occasional violence at home, and the ideological challenge of Socialism.

Fourth, the fire metaphor triggered a special, but predictable "role theme," a linguistic composition that prescribes *dramatis personae* for the principal players in the constitutional performance, as well as a script containing expected occurrences likely to provoke a host of common feelings.[52] During this period, the metaphor assigned the state the role of firefighter who extinguishes the sparks of revolution, motivated by a desire to protect public safety. The Court, for its part, enabled and applauded the state's aggressive suppression of speech, acting as the firefighter's loyal assistant. Finally, the metaphor cast the defendant-speaker in the part of the hated arsonist, who was duly blamed for unleashing the dire threat to our constitutional order. The entire metaphorical structure of judicial discourse served to underscore the Court's inclination to treat the speaker's words not as expression, but more like an inchoate act of revolution interrupted by vigilant authorities.

Fifth, the staging of First Amendment meaning regularly tracked a chronology of expected acts: the psychological danger to constitutional equilibrium is posed by the individual's incendiary ideas, the state is lauded by the Court for preserving the very existence of the American way of life, and, the individual's punishment having been sustained, the reader-citizen is urged to return to the relative state of harmony that characterizes his daily existence. This peculiar script became a repeatable implement of judicial authority and an enduring feature of First Amendment culture.

A. ON THEATER FIRES AND LEGAL INCANTATIONS

In a series of controversies resolved in the wake of World War I, fire and law became fatally entwined. Oliver Wendell Holmes, who believed himself "touched with fire"[53] through the trials of war, would become a Promethean firegiver. But Holmes's gift of fire-based rhetoric soon raged beyond his own ability to control it.

Schenck v. United States,[54] decided in 1919, represented the first appearance of the fire motif in First Amendment law. Charles Schenck and Elizabeth Baer were convicted of violating the Espionage Act for mailing circulars that equated

52. *See* ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES 132-33 (1977) (discussing cognitive structure of scripts and explaining that "once a role theme is invoked, it sets up expectations about goals and actions"); *see also* Tsai, *supra* note 26, at 89-91.

53. Holmes was asked to give an 1884 Memorial Day address in Keene, New Hampshire. Looking back on his Civil War experiences, Holmes famously said, "The generation that carried on the war has been set apart by its experience. Through our great good fortune, in our youth our hearts were touched with fire." Memorial Day: An Address Delivered May 30, 1884, at Keene, N.H., Before John Sedgwick Post No. 4, Grand Army of the Republic, *in* THE ESSENTIAL HOLMES 80, 86 (Richard A. Posner ed., 1992).

54. 249 U.S. 47 (1919).

conscription with despotism. On appeal, Holmes's opinion affirming their sentences loosely compared the defendants' actions with "falsely shouting fire in a theater and causing a panic," which not even the most generous reading of the First Amendment would protect.[55] The phrase did not employ a fire metaphor as such, but wove a fire-based hypothetical with the circumstances of the case at hand. Nevertheless, Holmes's use of fire to create a sense of emergency had the desired effect of promoting the Court's policy of judicial non-involvement.[56]

This judicial incantation—a brief, catchy, jargon-free statement that itself became a quotable conception of law—sprang into existence at a time in which actual fires swept the nation. A number of prominent theater fires would have been on the minds of most Americans, in an era in which there were too few exits at public theaters and exceedingly poor firefighting technology. The most devastating theater fire in American history occurred in 1876 in Brooklyn, New York, killing nearly 300 people who had gathered to watch the play *Two Orphans*.[57] And on December 30, 1903, the Iroquois Theater in Chicago burned to the ground during a performance of *Mr. Bluebeard*. During the second act, sparks from a blown light fuse ignited the backdrop. Within fifteen or twenty minutes, the fire had run its course; 602 people died that day.[58]

Though derided as "trivial and misleading,"[59] the adage "falsely shouting fire in a crowded theater" has come to serve a dual function in legal culture: first, the image acts as a prototype for unprotected expression; second, it broadly operates as a mantra of judicial influence, inviting acceptance of interpretive

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55. *Id.* at 52. For a reconsideration of Holmes's contributions to free speech jurisprudence, *see* Yosal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349 (1984).

56. In the context of the case, the analogy was inapt for a number of reasons. The person falsely shouting fire is issuing an unnecessary warning rather than advancing a political program. Moreover, theatergoers make up a captive audience who are likely to alter their actions if they believe they are in an emergency situation; it is considerably less likely that inductees would be motivated to disrupt national policy through the circulation of anti-draft mailings. The first situation engages a danger instinct, while the second may or may not produce concerted action. One's self-preservation instinct, if it is to kick in at all, should already have been engaged by being drafted; it is difficult to see how much more an anti-war circular would add. Additionally, for many recipients of the anti-draft circulars, the overpowering sense of patriotism and duty will render the circulars ineffectual. This goes to show that it is not logic alone that dictates the staying power of a legal mantra.

57. DENNIS SMITH, DENNIS SMITH'S HISTORY OF FIREFIGHTING IN AMERICA: 300 YEARS OF COURAGE 88, 90 (1978). Between 1875 and 1920, there were at least four devastating theater fires in the continental United States and Puerto Rico, killing over 1200 people. Theater fires in the United Kingdom, Paris, and Vienna during this period caused another 1020 deaths. *See* Smith, *supra*, at 88-91, 107-09; *see also Theater Fires*, *at* http://www.disaster-management.net/theater_fire.htm (last visited Dec. 30, 2004). In Europe too, fires in theaters and hotels gripped the imagination. *See generally* HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 197 (1992); CHARLES ROETTER, FIRE IS THEIR ENEMY 151-57 (1962).

58. SMITH, *supra* note 57, at 109. L.A. Powe posits that Holmes, an avid theatergoer, could have been inspired by a Pennsylvania theater fire in 1911 or a conflagration in Michigan sixteen months later, though surely it matters less which fire sparked his interest and more that there was a common cultural experience that gave his words resonance. *See* L.A. Powe, Jr., *Searching for the False Shout of Fire*, 19 CONST. COMMENT. 345 (2002).

59. KALVEN, *supra* note 43, at 133.

choices. Chanted once, twice, three times, the saying rings in our heads, conjuring a convenient image of speech as the primary threat to public order. During legal performance, it provides critical mood lighting, setting the stage for the interpretive move that is to come.

Truly, the epoch of fire had begun in earnest. Like other aphorisms that have acquired trans-substantive power in the law, Holmes's legal mantra has occasionally wandered beyond the frontiers of its doctrinal motherland.[60] From the moment that it was first recited in constitutional discourse, it would alternately serve as an exemplar or a foil. Beyond simply setting up strict analogies, the saying would be deployed in novel and imagistic ways. Over the years, the Court would evoke the chaotic image of fire, panic, and trampling by associating it with such diverse subject matter as excessive urban noise,[61] the broadcasting of vulgar jokes on the radio,[62] and noisy picketing outside courthouses.[63]

B. A METAPHOR IS BORN: KINDLING REVOLUTION

Several days after the Justices handed down *Schenck*, they upheld the conviction of Jacob Frohwerk under the Espionage Act for publishing articles questioning the legality of America's conscription law. Writing for a unanimous Court, Holmes explained that "it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[64]

Six years later, in *Gitlow v. New York*, the Supreme Court affirmed the conviction of Benjamin Gitlow, a Socialist, for advocating criminal anarchy.[65]

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60. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 399 (1992) (White, J., concurring); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 n.70 (1982); Consolidated Edison Co. of New York v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 545 (1980); FCC v. Pacifica Found., 438 U.S. 726, 744 (1978); Smith v. Collin, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting); Smith v. United States, 431 U.S. 291, 318 n.16 (1977) (Stevens, J., dissenting); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 399 (1973) (Douglas, J., dissenting); Miller v. California, 413 U.S. 15, 42–43 (1973) (Douglas, J., dissenting); N.Y. Times v. United States, 403 U.S. 713, 749 (1971) (Burger, J., dissenting); Brandenburg v. Ohio, 395 U.S. 444, 456 (1969); Cox v. Louisiana, 379 U.S. 559, 563 (1965); Beauharnais v. Illinois, 343 U.S. 250, 284–85 (Douglas, J., dissenting); Kunz v. New York, 340 U.S. 290, 298–99 (1951) (Jackson, J., dissenting); Kovacs v. Cooper, 336 U.S. 77, 86 (1949); Thomas v. Collins, 323 U.S. 516, 536 (1945); Bridges v. California, 314 U.S. 252 (1941); Gilbert v. Minnesota, 254 U.S. 325, 332 (1920).

61. *Kovacs*, 336 U.S. at 86.

62. *Pacifica*, 438 U.S. at 744–45. The phrase appeared in the Court's explanation of why some content-based restrictions on speech are tolerable. The Court also deployed the marketplace metaphor to support suppression of George Carlin's "Seven Dirty Words" because, as a low-value utterance not essential to the exposition of ideas, the monologue lay beyond the "marketplace of ideas." *Id.* at 745.

63. *Cox*, 379 U.S. at 563. The Court invoked this image while upholding a state law that prohibited interference with the administration of justice. It went on to deem the application of the law to silence a protester's activities as a violation of First Amendment principles. *Id.* at 564–65.

64. Frohwerk v. United States, 249 U.S. 204, 209 (1919).

65. The New York law at issue made punishable by imprisonment or fine any person who "by word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence" or "prints, publishes, edits, issues or know-

Gitlow ran afoul of state law merely by arranging for the printing and distribution of a Communist manifesto. Taking a cue from *Frohwerk* (and over a sharp dissent penned by Holmes), Chief Justice Edward T. Sanford's opinion in *Gitlow* raised the full image of fiery doom:

> A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.[66]

In *Frohwerk*, as in *Gitlow*, the fire metaphor conjured up what cognitive linguists call an "experiential gestalt" or a "frame of understanding"—a repeatable organizing linguistic structure that packages cultural events, patterns of belief, outlooks, and familiar sensations.[67]

According to the frame of understanding activated by the Court's fire metaphor, speech is *like* fire, ignited by the speaker-as-arsonist. *Frohwerk*'s "little breath" became *Gitlow*'s "spark." Fire signifies the key characteristics of speech that the Justices wish us to contemplate. When the sacred flame is invoked in this fashion, our natural reaction is to become afraid. Our danger instinct is immediately engaged; our attention is trained on identifying and avoiding or destroying the source of the threat.

Fire serves as the symbolic equivalent of the slippery slope argument, that time-honored technique of doctrinal analysis.[68] As the language device suggests, the "spark" of revolutionary talk is so combustible that, if left unchecked, it will inexorably result in a roaring "conflagration" obliterating the social world as we know it. In this way, our childhood experience with fire is converted into a mechanism by which to make sense of legal acts.

What made the symbolic union of fire and speech especially compelling was the political and social climate in which the controversy simmered and ultimately boiled over. By the turn of the century, every major city, from San Francisco to Chicago to New York, had experienced urban fires that devastated

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ingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means." Gitlow v. New York, 268 U.S. 652, 654–55 (1925).

66. *Id.* at 669.

67. *See* GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 489-90 (1987); Charles Fillmore, *Frames and the Semantics of Understanding*, 6 QUADERNI DI SEMANTICA 222 (1985).

68. *See* Tsai, *supra* note 26, at 89–91. (distinguishing between explicit rhetorical moves and judicial invocation of less formal, symbolic devices). On the operative feature of slippery slope arguments, see Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469 (1999); Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

whole neighborhoods. The 1906 San Francisco earthquake and fire leveled 25,000 buildings, killed 500 people, and left hundreds more homeless, earning San Francisco its reputation as the "City of Doom." Major fires occurred between 1910 and 1916 in Philadelphia, New York, and New Jersey. And it would not have been lost on the Court that the worst fire of the twentieth century, which occurred in 1918 in the forests of Minnesota, led to 559 casualties. Even today, citizens of western states live with the fear of seasonal forest fires, threatening to level homesteads and ruin crops.[69]

More particularly, the threat of ideological subversion helped to draw a close and natural bond between fire and alien ideas in the public imagination. Political elites, as much as average citizens, came upon socialist literature or activities in the streets and the newspapers, and on the radio. Socialism, ideologically opposed to capitalism but not yet discredited by the authoritarian excesses of the Soviet Union, appeared to have migrated across the Atlantic and was now sweeping the nation.

Indeed, socialist writings were awash in the speech-as-fire metaphor. The frightening, inevitable, and consuming dimensions of fire would have resonated strongly with those who had exposure to Communism's ideological structure. Emphasizing the potential of one "spark" to light a "conflagration" called to mind Lenin's revolutionary publication, "The Spark"[70] (the motto was taken from the experience of the Decembrists, who had launched a failed coup against the Tsar of Russia in December 1825). It also served as a reminder of the teleological structure of Socialist thought, in which industrial capitalism, catalyzed by worker strikes around the world, would inevitably give way to a new Socialist order.[71] A string of bombings in 1919 linked to radical collectivists no doubt weighed heavily on the minds of the Justices and ordinary Americans.[72]

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69. The multiple fires in southern California in the fall of 2003 garnered national headlines. According to reports, 7,000 firefighters worked to control the twin fires in San Diego County that devoured nearly 750,000 acres of land and destroyed 3,500 homes. *See* Alan Zarembo et al., *Fire Crews Gain Ground*, L.A. TIMES, Nov. 1, 2003, at A1.

70. "Iskra," or "The Spark," was published by Lenin and Trotsky. It was inspired by a line in a letter from an exiled Decembrist to the Russian poet Alexander Pushkin: "The spark will kindle a flame." *See* HISTORY OF THE COMMUNIST PARTY OF THE SOVIET UNION (BOLSHEVIKS) 24 (Comm'n of the Central Committee of the C.P.S.U. (B.) ed., 1939).

71. *See generally* KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO (1848).

72. Edward White notes that "an awareness among Americans of the doctrines of radical collectivist European ideologies, such as socialism or syndicalism, had begun to emerge, sparked by the formation of the Communist Third International in March 1919. Radical collectivists were associated with a rash of bombings in the spring of 1919, one set of which affected Holmes personally." G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 421 (1993).

This background made it easier for those in the majority in *Gitlow* to conclude—and for many of their readers to agree—that "[t]he means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts . . . necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order." 268 U.S. at 665.

1. (Role)Playing with Fire

Constitutional metaphor does much more than delight our senses and engage our ability to reason by analogy. In the hands of a cultural institution such as the Supreme Court—an entity that serves both as a repository of legal culture and as a formidable engine driving its creation—metaphor frames, illuminates, and reinforces constitutional authority. In the legal domain, metaphor also configures legal doctrine and reveals institutional relationships. Metaphor accomplishes these tasks by activating powerful frames of judicial power, creating mental space for the assertion of judicial prerogative, and invoking recurring myths so as to promote acceptance of state power. When fire is evoked, opinion readers sense crisis, experience psychic tension, and naturally demand relief.

Consider the performative dynamics of this metaphor, that is, the ways in which it brings alive the full force of legal authority in our minds and moves us to think and feel a certain way about constitutional actors' place in our lives. Juridic usage of the language of fire entails ritual and mythmaking, promoting understanding while provoking our emotions. As Turner explains, social dramas unfold in four stages: during the first stage, a social breach is initiated and revealed; in the second stage, crisis seizes the entire arena in which the drama is played out; in the third stage, social energy is expended to redress the breach; and in the fourth and final stage, either the party responsible for the breach is re-integrated into the community or the breach itself is ritualistically legitimized.[73]

Although a judicial opinion is rendered during the later stages of a public contest, the elements of ritual inhere in the very structure of constitutional language. If law is a grand performance, then metaphor contains a kind of screenplay, replete with roles, story lines, cues, and scene blocking.

Anthony Amsterdam and Jerome Bruner define scripts as "walk-through models of a culture's canonical experiences."[74] The recurring script or scenario[75] underlying the speech-as-fire metaphor can be charted in the following four acts:

> Arsonist-speaker threatens the legal order → State attempts to extinguish the fire through regulatory suppression → Court endorses the action → Constitutional equilibrium is restored.

As the opinion reader is ritually taken through each step and receives his cues, the elements of danger, crisis, resolution, and redemption are forecast, unfolded, and synthesized.

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73. *See* TURNER, *supra* note 35, at 34; TURNER, *supra* note 8, at 38–40.

74. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 45 (2000).

75. While Schank and Abelson call these language structures "scripts," see ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS AND UNDERSTANDING (1977), Lakoff prefers "symbols" or "gestalts." *See* LAKOFF, *supra* note 20, at 284–85.

Role-playing is a core element of metaphor, for the roles rhetorically assigned to each of the constitutional actors by the language composition convey the scope and significance of judicial authority. The speech-as-fire metaphor instantly casts the state in the fabled role of firefighter, quick to stamp out the "sparks" of revolt. The character of the firefighter, summoned from daily experience and our ancient desire for savior figures, is immensely comforting because it envelops the state in an aura of selflessness and bravery, and portrays the state's course of action as a socially beneficial, even regime-preserving endeavor.

The role of the firefighter would have resonated strongly with the American populace at the turn of the century, given the onslaught of urban and rural fires that ravaged the country.[76] But the sustained fascination with firefighting also arises from popular perception of voluntary firefighting associations throughout the nineteenth century. The associations were responsible not only for extinguishing fires when they occurred, but also for managing fire prevention and early warning systems.

Firefighters were a special breed of men who could do no wrong. Called from among the citizenry,[77] they quickly assumed mythic status. They exemplified strength, vigor, valor, selflessness, and honor. Community leaders publicly commended firefighters for their bravery and skill when they saved the day, and eulogized them when they fell. Poems, books, news articles, and artwork portrayed the fireman as a uniquely American hero, saving a woman or child, or expertly dousing a flame before it raged beyond control. In a news story characteristic of the times, the *Missouri Democrat* reported: "The [theaters] were saved by the intrepid energy of the firemen who upon the threatened peril hastened to the spot . . . though in a situation fraught with danger."[78]

In paintings and on posters, in sketches and in sculptures, artists bathed the fireman in a divine light as he tamed the smoke and flames of darkness. As historian Amy Greenberg explains, "The fame of the volunteer fireman was to be eternal . . . . [T]he citizen could achieve immortality through noble deeds performed in the public realm, deeds like those of the fireman."[79] Consider a typical nineteenth century poem praising the Olympian attributes of the American firefighter:

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76. *See* BOSMAJIAN, *supra* note 57, at 197; *see also* text accompanying note 69.

77. In early days, firefighters "were the leading citizens in the community, and they were the nobodies. They were the wealthy merchants, and they were the lowly clerks. They were actors, retired soldiers, butchers, shipbuilders, victualers, street brawlers without visible means of support. In short, they were a cross section of America." ROBERT S. HOLZMAN, THE ROMANCE OF FIREFIGHTING 3 (1956). As Greenberg explains, during the seventeenth century, "[f]ire was the responsibility of all citizens." AMY S. GREENBERG, CAUSE FOR ALARM: THE VOLUNTEER FIREMAN IN THE NINETEENTH CENTURY CITY 10 (1998). By the nineteenth century, fire companies were manned by volunteers. *Id.* at 11.

78. MISS. DEMOCRAT, Sept. 23, Oct 14, Nov. 20, 1856, *quoted in* GREENBERG, *supra* note 77, at 25. Firemen were frequently praised for their "superhuman efforts," fearlessness, and self-sacrifice. *See generally* GREENBERG, *supra* note 77, at 19–29.

79. *Id.* at 25.

> Hail! Noble, chivalrous, bold, daring fireman,
> Who struggles to save, though enshrouded in flame,
> Who offers up life on philanthropy's altar!
> Your name is inscribed on the portals of fame.[80]

Then, as now, this American archetype loomed large on the cultural landscape. On the West Coast today, it is the expertly trained citizen-smokejumper, parachuting into the heart of a raging forest fire, who occupies a mythical place in our imaginations. This figure stands on the last line of defense that keeps seasonal outbreaks of forest fires from ravaging our homes and businesses, and indeed, our very way of life.[81] And one need only remember the heroic images of New York City firefighters, featured on the cover of national periodicals in the wake of the terrorist attacks on September 11, 2001, to appreciate how tragedy and crisis spin this culturally embedded icon to convey a sense of danger, hope, and redemption. Through metaphor, the firefighter has become a fixture of free speech lore.

According to the experiential gestalt triggered by the fire metaphor in free speech decisions, and as re-enacted in successive rulings and public discourse, the arsonist-as-speaker represents the impending menace to the politico-legal order. The story line signals that although the peril is great, social tension can be easily ameliorated through separation and isolation of the arsonist.

Notice that the fire metaphor's screenplay casts the People as vulnerable, fixed objects rather than as dynamic, fully autonomous constitutional subjects. It signals that the impressionable passerby, like the panicked theater patron, must be rescued from provocative utterances. It treats the citizenry collectively as tinder, fuel for the sparks of revolution.

Animating legal doctrine, the speech-as-fire metaphor dramatizes the following homologies or word relationships:

> discuss: spark::
> speech: act::
> productive: dangerous::
> protected: unprotected::
> deliberation: conflagration::
> democracy: communism.

Expression could be socially beneficial and embody democracy in action by promoting reasoned deliberation. Alternatively, words themselves could be

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80. Count D., *Lines to the Fire Department*, FIREMAN'S JOURNAL, Apr. 7, 1855, *reprinted in* GREENBERG, *supra* note 77, at 25.

81. *See* Kirk Johnson, *As Fire Season Approaches, Dread Grows in the* West, N.Y. TIMES, May 22, 2004, at A14. Although aerial fire detection patrols began in 1918, smoke jumping started as an experiment in the summer of 1939 by the U.S. Forest Service. *See* Aerial Patrols, *at* http://www.smokejumpers.com/history/aerial_patrols.php (last visited June 1, 2004).

dangerous objects, kindling disorder and violence on behalf of foreign ideologies. At least in theory, the fire-colored language left open the possibility of the former scenario, but in actual practice it stressed the latter network of conceptual associations.

The day when the Court would issue a ringing endorsement of the value of public gatherings and controversial expression was still in the distant future. In the meantime, the prevailing fire metaphor highlighted what appeared to be the inherently destructive quality of the expression at issue, the commendable aspects of the state's actions, the presumed vulnerability of the speech-audience, and ultimately the wisdom of the policy of judicial non-interference.

Just as important as its impact on legal categories, the fire metaphor offered what Jack Balkin has called the "cultural software" for still more legal innovation, as first jurists, then litigants, reprogrammed the metaphor in the course of constitutional lawmaking.[82] Its gestalt properties—the unique blend of culture and language—would become *fully modular*, replicated in intellectual circles, in legal briefs and rulings, and in expert and popular commentary. Each interpenetrating source served in turn as new inspiration for the mythology of fire and forged new avenues for legal doctrine. Originally tethered to the "bad tendency" test, fire eventually became unmoored from its doctrinal foundations at the boundary between speech and conduct. It initially operated as shorthand for dangerous expression. By the end of the twentieth century, fire had evolved into a symbol for laws that threatened freedom.

2. Variations on a Theme

A close reader will note that *Gitlow* in fact depicted dueling fire metaphors. Even as the majority opinion unleashed fire imagery to frighten, shock, and justify state suppression of speech, Holmes's dissenting opinion, which Louis Brandeis joined, enlisted the more positive properties of fire:

> Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[83]

Cleverly turning his colleagues' own metaphor against them, Holmes did not seek to end the use of the speech-as-fire formulation so much as propose a shift in how it should be implemented. For Holmes, expression remained combus-

82. "Cultural software" consists of "the abilities, associations, heuristics, metaphors, narratives, and capacities that we employ in understanding and evaluating the social world." JACK BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 6 (2002). As Balkin explains, cultural bricolage has several features: it is cumulative and economical, and it leads to unintended uses and consequences. *Id.* at 32–33.

83. Gitlow v. New York, 268 U.S. 652, 673 (1925).

tible, yet he urged that the tasks of alarm-raising and firefighting should not rest exclusively with the state—at least where there is sufficient doubt as to whether lawlessness would follow utterance.

In the years leading up to the Second World War, the Justices predictably evoked the terrifying qualities of fire to organize and distill legal doctrine, and approve state suppression of revolutionary expression. At the same time, these patterns in legal language and thought were preserved in "memes," units that facilitated cultural transmission even as they offered raw material for the creation of a counter-mythology.[84]

Somewhat surprisingly perhaps, Holmes's fire-positive formulation, "eloquence may set fire to reason," never fully caught on. It would appear in two concurring opinions, in 1969[85] and 1971,[86] and then disappear entirely from the legal arena, demonstrating once again the durability of fire's metaphorical fields.[87] That Holmes's variation initially appeared in a dissent and was not mentioned by the Court for another four decades surely hastened its fade into obscurity.

As the overarching paradigm of crowd control began to dictate the Justices' handling of First Amendment questions, the phrase "every idea is an incitement" would become the mantra of choice.[88] For the time being, the counter-metaphors and images introduced in *Gitlow* would have to await a more hospitable climate.

A similar fate met a colorful saying coined by Justice Brandeis. *Whitney v. California*[89] upheld the conviction of a Communist Party member for violating a state criminal syndicalism law. In a concurring opinion, Justice Brandeis agreed that there was ample evidence to affirm the conviction, but disagreed with the majority's suggestion that the Fourteenth Amendment might not protect gatherings to advocate proletarian revolution in the distant future. Memorably, he stated: "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."[90]

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84. *See* RICHARD DAWKINS, THE SELFISH GENE 192 (1989); BALKIN, *supra* note 82, at 43 ("Memes encompass all the forms of cultural know-how that can be passed to others through the various forms of imitation and communication.").

85. Brandenburg v. Ohio, 395 U.S. 444 (1969).

86. Samuels v. Mackell, 401 U.S. 66 (1971).

87. *Brandenburg*, 395 U.S. at 453 (Douglas, J., concurring); *Samuels*, 401 U.S. at 74 (Douglas, J., concurring). Usually, Supreme Court language inspires lower courts to follow suit, but Holmes's fire-positive metaphor appears only in one lower federal court ruling, a dissent. *See* United States v. Giese, 597 F.2d 1170, 1209 (9th Cir. 1979) (Hufstedler, J., dissenting).

88. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 580 (2001) (Thomas, J., concurring); McDaniel v. Paty, 435 U.S. 618, 641 n.24 (1978) (Brennan, J., concurring); *Samuels*, 401 U.S. at 74 (Douglas, J., concurring); Norton v. Disciplinary Comm. of E. Tenn. State Univ., 399 U.S. 906, 908 (1970) (Marshall, J., dissenting from denial of cert.); *Brandenburg*, 395 U.S. at 453; Yates v. United States, 354 U.S. 298, 327 (1957); United States v. Int'l Union United Auto., Aircraft and Agric. Implement Workers, 352 U.S. 567, 595 (1957) (Douglas, J., dissenting); Dennis v. United States, 341 U.S. 494, 545 (1941).

89. 274 U.S. 357 (1927).

90. *Id.* at 376.

Speaking for himself that day, Brandeis thus summoned a vision of the primitive, pre-modern world, a time when people reacted rashly in the face of phenomena they did not understand. In a heartbeat, he drew upon the myth of fire to illustrate that censorship was borne of an impulsive ignorance and that the First Amendment served a civilizing function. Yet despite the undeniably poetic quality of Brandeis' words, they failed to find cultural traction in their own time.[91] For a saying to captive the legal imagination, artistry matters less than cultural receptivity. Speech-friendly mantras may have been on the menu, but for now no one was ordering.

III. THE POST-WAR INTERREGNUM: TRANSITIONS

Because the Justices introduced the speech-as-fire metaphor to the American audience under extraordinary circumstances, one might have expected it to fade into disuse as soon as the exigencies of war passed. Yet this was decidedly not to be, illustrating the instrumental and open-textured qualities of constitutional language. First, once set free in the law, these meaning-generating devices are subject to future manipulation by other constitutional actors. Hence, constitutional metaphor is not simply reflective of culture, but reflexive; it is both a mirror and an instrument. Some jurists employed fire to draw one-for-one analogies; others did not so much try to draw tight comparisons between fire and another object as to use images of fire in more panoramic terms.

A second point flows ineluctably from the first. Although legal language carves strong patterns in the historical record, there is an element of unpredictability to the paths of performative utterances as jurists reuse them imaginatively in fresh settings and see them molded by the ethos of the times. Hence, one should find moments of experimentation as well as discontinuity.

Both dynamics can be discerned in the Supreme Court's rhetorical strategies during the second epoch, a liminal period characterized by several overlapping currents. In the immediate post-war years, the internal structure of the fire metaphor remained largely intact, re-invigorated by memories of conflict. The Court exhibited a persistent inclination in peaceful periods to treat speech as a mercurial yet hazardous product, always a half-step from erupting into "inflammatory talk, such as the shouting of 'fire' in a school or a theatre"[92] or other kinds of "incendiary street . . . speech."[93] In fact, the anti-totalitarian enterprise—a legacy of the Second World War—utterly dominated free speech mythos.

Dennis v. United States,[94] decided in 1951, rained fire. Virtually every

91. Brandeis's use of fire's destructive potential in a pro-speech fashion reappeared in *Dennis*, 341 U.S. at 585. More recently, it had a bit part in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475 (1995), to suggest that the government's generalized fear of corruption did not justify a sweeping ban on public employees' receipts of honoraria for speaking engagements.

92. Beauharnais v. Illinois, 343 U.S. 250, 284 (1952) (Douglas, J., dissenting).

93. *Id.* at 304 (Jackson, J., dissenting).

94. 341 U.S. 494 (1951).

opinion in the case harkened to the speech-as-fire metaphor, demonstrating the alacrity with which the Justices wielded this rhetorical device to facilitate an aggressive anti-Communist agenda throughout the decade. Authored by Chief Justice Fred Vinson, the majority opinion upholding the convictions of Eugene Dennis and his compatriots for conspiracy to advocate overthrow of the government, emphasized the "inflammable nature of world conditions" and warned that "[i]f the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."[95] Experiential properties—namely, generalized concerns about explosives and an omnipresent fear of Communist hegemony—were thus melted down and forged into a keen cognitive threat: teaching the precepts of Communism was the fuel, but the state-as-firefighter's early warning system stamped out the spark before disaster struck.

Justice Robert H. Jackson's concurring opinion also deployed the fire metaphor, not to say that the legal test associated with fire should control the situation at hand, *but to emphasize that it did not go far enough.* Jackson argued that the clear and present danger test applied to situations involving "a hot-headed speech on a street corner, or the circulation of a few incendiary pamphlets," but did not afford the state the necessary latitude to combat the most insidious forms of totalitarianism.[96]

Justice William O. Douglas's dissent in *Dennis* artfully invoked both the speech-as-fire metaphor and the witch-burning mantra from *Whitney*.[97] Douglas first acknowledged that "[s]peech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic."[98] But then, reciting the pro-speech *Whitney* formula, he implied that punishing the defendants for teaching Communism was tantamount to burning women at the stake. His tactic of employing a speech-positive mantra of fire to negate a speech-negative metaphor of fire, reminiscent of Holmes's own move in *Gitlow*, was a play off Brandeis's modern riff. Like Brandeis before him, Douglas suggested that the progressive instinct justified greater judicial supervision of state regulation affecting expressive life.

If the metaphor's formal outline held true, it nevertheless demonstrated a receptiveness to social change as the Court reworked the cultural debris of earlier epochs into new forms. Two developments revealed the mercurial quality of constitutional theater. Race had a hand in both trends.

One cross-current consisted of a gradual but perceptible shift in the cultural resources of the fire metaphor through the inclusion of social fear of racial strife, which colored the First Amendment arena and rapidly spilled over into other areas of law. Steeped in a hearty anti-totalitarian ethos, this volatile fire-race cocktail was usually served up in regulation-friendly ways.

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95. *Id.* at 511.

96. *Id.* at 568 (Jackson, J., concurring). Jackson would later recycle this image in his dissenting opinion in *Beauharnais*, 343 U.S. at 302 (Jackson, J., dissenting).

97. Whitney v. California, 274 U.S. 357 (1927).

98. *Dennis*, 341 U.S. at 585 (Douglas, J., dissenting).

A second development stemmed from the post-war rise of the pro-speech metaphor of the deliberative assembly, which was accompanied by its own set of scripts, roles, and stage directions. The assembly metaphor counterbalanced the fire metaphor by breaking down the fire metaphor's tendency to blur speech and act, and its power to link inflammatory words with incipient chaos. Emerging tentatively at first, this new language device generated momentum throughout the 1960s and 1970s. It, too, mirrored institutional and popular views about race as a result of the civil rights struggle.

A. FUELING ANTI-TOTALITARIANISM

In the late 1940s and early 1950s, the primary cultural driver of the fire metaphor remained political subversion from foreign ideas. A latent fear of racial discord occasionally burst through constitutional language during this time; avoiding such strife became integral to the anti-totalitarian agenda. The national consciousness remained steeped in the afterglow of fighting two world wars. As members of the national leadership, the Justices seized the opportunity to apply the lessons of war, nationalism, and racial hatred to the homefront. Accordingly, in the case of *In re Yamashita*,[99] Justice Frank Murphy decried the "fires of nationalism" in dissenting from the Court's decision to deny the writ of habeas corpus to a Japanese general.[100]

In this transitional space, the external threat to the country briefly subsided, but the Cold War, with its corresponding binary mentality, had not yet crystallized.[101] Once the governing metaphorical field relaxed its grip and public attention turned inward for a time, fear of internal divisions of another kind—involving race and ethnicity—began to creep into the public imagination. Fear of impending social crises revolving around questions of race gave constitutional language a distinct glow, affecting the path first of First Amendment law, then Equal Protection doctrine, and then free speech law once again. In *Oyama v. California*,[102] in which the Court held that California's Alien Land Law violated the Equal Protection Clause, Justice Murphy wrote in his lengthy concurrence that "the arrival of the Japanese fanned anew the flames of anti-Oriental prejudice" and that "[t]he fires of racial animosity were thus kindled and the flames rose to new heights."[103]

Hughes v. Superior Court,[104] decided in 1950, exemplifies the state of First

99. 327 U.S. 1 (1946).

100. *See id.* at 26 (Murphy, J., dissenting).

101. The years 1948 and 1949 were pivotal. The Berlin Blockade occurred in 1948-49, and 1949 brought two events that contributed to the Cold War mindset: the Communists' victory in China and the Soviet Union's testing of an atomic weapon. The term "Cold War" did not enter the constitutional canon until 1951–52 in cases like *Dennis v. United States*, 341 U.S. 494 (1951), and *Wieman v. Updegraff*, 344 U.S. 183 (1952). By that time, the Korean War was well underway, and George Kennan's containment theory had become the lynchpin of American foreign policy.

102. 332 U.S. 633 (1948).

103. *Id.* at 659 (Murphy, J., concurring).

104. 339 U.S. 460 (1950).

Amendment culture during the interregnum. There, the Supreme Court sustained a contempt order based on an injunction against picketing a grocery store. Picketers had carried placards reading, "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize." They hoped to pressure the grocery store into hiring African-American employees until the racial composition of its staff approximated that of the store's customers.

Turning aside a free speech challenge to the injunction, Justice Felix Frankfurter's opinion characterized the demonstration as unlawful "industrial picketing."[105] Tellingly, he drew a word-picture of endless racial strife if the interests of these picketers were accorded constitutional status:

> If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. . . . To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. . . . The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law.[106]

This portrait of unremitting racial discord depriving the businessperson of his or her "liberty" shifted attention away from the admittedly peaceful nature of the demonstration toward an imaginary world in which every ethnic and racial group took to the streets demanding their spoils, armed with the law of the First Amendment. It was a vision too terrifying to behold.

Beauharnais v. Illinois,[107] a decision that perhaps best illustrates this troubling development in free speech jurisprudence, concerned an Illinois statute that prohibited any publication or exhibition portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens . . . [and] expos[ing] the

105. Picketing was then viewed as "not being the equivalent of speech as a matter of fact," but rather as economic sabotage. *See id.* at 465. In the Court's own words, "[T]he very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Id.* Three decades later, the line between economic picketing and political demonstration had largely been eroded. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that non-violent participants in a boycott against white business owners were protected against liability by the First Amendment).

106. 339 U.S. at 464 (quoting Hughes v. Superior Court, 198 P.2d 885, 889 (Cal. 1948)). The Court seemed to approve the California Supreme Court's distinction between picketing to promote discrimination and picketing against discrimination, treating the former as unlawful and unprotected. *Id.* at 466. With little analysis, it treated the picketers' purpose as the promotion of discrimination rather than its amelioration, and the rest of the First Amendment analysis accordingly went against the protesters.

107. 343 U.S. 250 (1952).

citizens of any race, color, creed or religion to contempt, derision, or obloquy."[108] Joseph Beauharnais had distributed leaflets urging city leaders to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro."[109] In a key line of the leaflet that ran Beauharnais afoul of the statute, he added: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions, . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[110]

On appeal, the Supreme Court rejected the First Amendment challenge.[111] In an opinion authored by Justice Frankfurter, the Justices treated the concept of libel—stretched to encompass group libel—as a category of unprotected expression, like fighting words or obscenity. As support for the enactment, the Justices collectively cited over a hundred years of racial strife in the state:

> From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tensions between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part.[112]

What's more, in a revealing allusion to the last war, the Court signaled that the anti-totalitarian ethos of the era lent credence to the value of suppressing race-conscious expression: "Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community."[113] Betraying the zeitgeist of the times, the fire metaphor painted a word-picture of spiraling racial antagonism, riots, and even war, spurred by "inflammatory"[114] lies based on group traits.

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108. *Id.* at 251.

109. *Id.* at 252.

110. *Id.*

111. Although *Beauharnais* has never been explicitly overruled, two circuits have concluded that subsequent decisions "had so washed away the foundations of *Beauharnais* that it [cannot] be considered authoritative." Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985); *see also* Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1200 (9th Cir. 1989) (quoting *Hudnut* with approval).

112. 343 U.S. at 259.

113. *Id.* at 259 (citing, among other things, Karl Loewenstein's essay, *Legislative Control of Political Extremism in European Democracies*, 38 COLUM. L. REV. 591 (1938)). The dissents showed how central the war experience was to the Justices' deliberations: "Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy." *Id.* at 284 (Douglas, J., dissenting); *see also id.* at 304 (Jackson, J., dissenting) (explaining that state should be permitted some latitude to prevent "racial or sectarian hatreds").

114. *Id.* at 259 n.11.

Even Justice Jackson, in dissent, envisioned such a possibility on the horizon. Making a more direct use of the fire metaphor, he insisted that "[o]ne of the merits of the clear and present danger test is that the triers of fact would take into account the realities of race relations and any smouldering fires to be fanned into holocausts."[115]

Notice, however, that the Justices blamed immigration, relocation, and community building by ethnic and racial minorities for "stirr[ing] strife":[116]

> The law was passed on June 29, 1917, at a time when the State was struggling to assimilate vast numbers of new inhabitants, as yet concentrated in discrete racial or national or religious groups—foreign born brought to it by the crest of the great wave of immigration, and Negroes attracted by jobs in war plants and the allurements of northern claims.[117]

Contentious images of racial solidarity were thus conjured as the looming menace to the liberal constitutional order, secured through the sacrifices of war. The Court did, of course, emphasize that racial violence left a number of African-Americans physically injured or socially dislocated. Still, this rhetorical move, far from dissipating the abhorrent image of racial discord, largely reinforced the sense that false speech could stir up minorities to hurt themselves or instigate disastrous clashes with white Americans. It also fueled an impression of the state and the Court "struggling" mightily to deal sensibly with conditions partially of minorities' own making by protecting them through strict speech rules. There are shades of *Hirabayashi* and *Korematsu* in the Court's

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115. *Id.* at 304 (Jackson, J., dissenting). Most experts date the earliest appearance of the phrase "The Holocaust" in its present sense to 1965. *See, e.g.*, CHAMBERS DICTIONARY OF ETYMOLOGY 478 (Robert K. Barnhart ed., 2002). However, several pieces of evidence suggest that Jackson had the systematic annihilation of European Jews in mind when he referred to "holocausts." First, in *Beauharnais* itself, he spoke of the danger that race-oriented speech could "tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities," which appears to be an allusion to genocide. 343 U.S. at 304 (Jackson, J., dissenting). Second, in two cases that preceded *Beauharnais*, Jackson made more explicit references to this event. In *Terminiello v. Chicago*, Jackson specifically referenced Nazi ideology in his warning against "mastery of the streets by either radical or reactionary mob movements," which "became a tragic reality." 337 U.S. 1, 24 (1949) (Jackson, J., dissenting). In *Kunz v. New York*, he wrote that "Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz," could be forgiven for finding offense at public statements that Jews are "Christ-killers." 340 U.S. 290, 299 (1951) (Jackson, J., dissenting). Third, Jackson's biographers agree that his experience at Nuremberg influenced his legal writings. *See* EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 440, 455 (1958); JEFFREY D. HOCKETT, NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON 268 (1996); Paul A. Freund, *Mr. Justice Jackson and Individual Rights*, *in* MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR 47 (1969).

116. I take this phrase not from *Beauharnais* but from Justice Jackson's dissenting opinion in *Kunz v. New York*, 340 U.S. at 296 (Jackson, J., dissenting), where he unsuccessfully argued that a Baptist minister's conviction should be upheld because his aggressive street preaching "stirred strife and threatened violence." Although no one else signed the opinion, the phrase nevertheless captures the language practices of the era.

117. 343 U.S. at 259.

paternalistic use of racial imagery to justify state action.[118]

Though fire's second metaphorical field had long dissolved by the 1970s,[119] vestiges of the old order could still be identified in two cases in which individual Justices dissented from decisions to deny certiorari. In *DeFunis v. Odegaard*,[120] the ogre of race, fire, and speech reared its head in an early affirmative action controversy. Dissenting from the Court's disposition of the case on mootness grounds, Justice Douglas insisted that any state-sponsored preference for one race in law school admissions amounted to invidious discrimination under the Equal Protection Clause. Denying that any compelling state interest could support race-conscious admissions policies, Douglas claimed that such a course of action would devolve into unending racial strife.[121] To justify his position, he chanted the "fire in a crowded theater" incantation and argued that there could be no leeway for governmental consideration of race in matters involving competition over "mental ability":

> If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordionlike quality. Speech is closely brigaded with action when it triggers a fight, as shouting 'fire' in a crowded theater triggers a riot.[122]

Justice Douglas found cause to refer back to the nation's experience with Communism, though by 1974, he shared critics' unease over the courts' passive role during that period—he likened affirmative action programs to disfavored "cultural background tests," such as bans on admitting communists to the bar.[123]

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118. In *Hirabayashi v. United States*, 320 U.S. 81 (1942), the Court held that a race-based curfew was justified in part by the existence of a robust ethnic community and social and political "irritation" between Japanese and whites. As evidence of the conditions that give rise to an unknowable but existing number of traitors, the Court famously cited foreign language schools, anti-miscegenation laws, and laws denying citizenship. *Id.* at 96-99. In *Korematsu v. United States*, 323 U.S. 214 (1944), relying largely on its reasoning in *Hirabayashi*, the Court upheld the government's decision to exclude those of Japanese descent from military zones and inter them in camps because of an "unascertainable number of disloyal members of that population." *Id.* at 218.

119. *See infra* Parts III.C, IV.A.

120. 416 U.S. 312 (1974).

121. *See* id. at 341–42 ("The public payrolls might then be deluged say with Chicanos because they are as a group the poorest of the poor and need work more than others, leaving desperately poor individual blacks and whites without employment. By the same token large quotas of blacks or browns could be added to the Bar, waiving examinations required of other groups . . . The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish."). Douglas suggested that the state might be able to draw race-based distinctions in an extreme case, such as "racial susceptibility to certain diseases, [or] racial sensitiveness to environmental conditions that other races do not experience," but not with respect to admissions. To Douglas's mind, "[a]ll races can compete fairly at all professional levels." *Id.* at 343

122. *Id.* at 343–44 (Douglas, J., dissenting).

123. *Id.* at 343 n.23.

In *Smith v. Collin*,[124] Justice Harry Blackmun penned an equally provocative dissent from the denial of certiorari. After a protracted set of legal proceedings allowed the Ku Klux Klan to march through Skokie, Illinois, the Court refused to hear the matter further. Reminiscent of the predominant rhetorical strategy of the second epoch, Blackmun's dissent once again matched fire imagery with race, speech, and the horrors of the Second World War: "We are presented with evidence of a potentially explosive situation, enflamed by unforgettable recollections of traumatic experiences in the second world conflict."[125] Furthermore, Blackmun raised the possibility that

> when citizens assert, not casually but with deep conviction, that the proposed demonstration is scheduled at a place and in a manner that is taunting and overwhelmingly offensive to the citizens of that place, that assertion . . . . just might fall into the same category as one's 'right' to cry 'fire' in a crowded theater.[126]

As potent as these short dissents were, however, they remained outliers in the third epoch of fire, reflecting no consensus as to the institutional use of the metaphor.

B. THE METAPHOR OF THE ASSEMBLY UNLEASHED

In the meantime, a sideshow had begun to play out in the wings, drawing attention and resources from the metaphor of fire. A latent image of the people assembled out of doors began to dominate the Justices' post-war free speech jurisprudence. Indeed, the "incitement" test was predicated on this very notion of a gathering that could be, by turns, unruly or orderly, reactionary or enlightened. The emerging framework of crowd control facilitated the battle of metaphoric embodiments of the People.

Increasingly, the Court expanded the right to assemble by manipulating the cognitive ideal of the legislative meeting. Never mind how incongruous the comparisons, union gatherings, sidewalk sermons, racist rallies, and eventually anti-segregation demonstrations were juxtaposed against and ultimately benefited from their metaphoric association with the archetype of the deliberative body.

This boisterous metaphor perpetuated several conceptual oppositions:

> assembly: mob::
> speech: act::
> deliberation: violence::
> protected: unprotected.

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124. 439 U.S. 916 (1978) (Blackmun, J., dissenting from denial of cert.).
125. *Id.* at 918.
126. *Id.* at 919.

Through social mobilization, the People insisted on recomposing the score. *Thomas v. Collins*,[127] handed down in 1945, foreshadowed what was to come in the 1960s: the growing appearance of the metaphor of the convention and a corresponding decline in the frequency of the fire metaphor. In *Thomas*, the Justices overturned a contempt order against a union representative for failing to obtain an organizer's card, as required by Texas law. Concluding that the law violated the union leader's speech and assembly rights, the Court deployed one rising pro-speech metaphor (the meeting) against an active, speech-restrictive one (fire).

The Court's opinion began by explaining that "[t]he assembly was entirely peaceable, and had no other than a wholly lawful purpose."[128] It then pointed out that there was "nothing here comparable to the case where the use of the word 'fire' in a crowded theater creates a clear and present danger which the state may undertake to avoid or against which it may protect."[129] In so doing, the Justices raised the image of citizens gathering to do the business of the People in order to banish the image of the false fire alarm spreading panic. According to this powerful metaphor against which the union's activities were measured, a "meeting" entails "orderly discussion and persuasion."[130]

Assembly vanquished fire again in *Kunz v. New York* six years later.[131] There, the Court reversed a street preacher's conviction for failing to obtain a permit before conducting public worship. Justice Vinson's ruling cast Kunz's rambling one-man denunciations of Jews and Catholics in the best possible light by referring to them as "religious meetings" and matching them favorably to the assembly that "discuss[es] public questions."[132] By contrast, Jackson's dissent warned that listeners might metaphorically "file out of a theater in good order at the cry of 'fire.' But . . . there is a genuine likelihood that someone will get hurt."[133]

To be sure, the soaring image of the People constituting themselves out of doors as a deliberative body had its heyday in political debate during the framing of the Constitution.[134] Moreover, there had long been textual grounding for this ideal—the First Amendment explicitly guarantees the "right of the people peaceably to assemble, and to petition Government for redress," and

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127. 323 U.S. 516 (1945).

128. *Id.* at 536.

129. *Id.*

130. *Id.* at 530, 539; *see also* DeJonge v. Oregon, 299 U.S. 353, 365 (1937) (referring to "meetings" as assemblies at which "lawful discussion" occurs).

131. 340 U.S. 290 (1951).

132. *Id.* at 315.

133. *Id.* at 317 (Jackson, J., dissenting).

134. *See* THE FEDERALIST No. 40, at 251 (James Madison) (Clinton Rossiter ed., 1961) (appealing to legitimacy of "informal" gatherings by "patriotic and respectable citizens"); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 319 (1969) ("The conventions of the people would become for Americans permanent continuing institutions, integral parts of their political system, essential for its working, and always available for the people's use.").

Article V preserves the vehicle of the revolutionary "convention." But the passing of the founding generation and the paucity of active cultural-legal tools in the intervening years had relegated these hard-won commitments to little more than ink on parchment.[135] A proper alchemy of circumstances and ethos was necessary for these words to be salient once again.

The meeting metaphor blossomed in a duo of decisions in the 1960s. In *Edwards v. South Carolina*,[136] the Court reversed convictions for breach of the peace of black students protesting segregation. Writing figuratively, Justice Potter Stewart found that the student gathering exhibited indicia of "persuasion and argument," like a deliberative body, whereas a mob does not entertain reasoned discussion but instead involves "pushing, shoving, and milling around."[137]

Likewise, in *Cox v. Louisiana*,[138] the Court reversed the conviction of a student leader who demonstrated near a courthouse to protest the arrest of black students associated with the civil rights movement. Concluding that the conviction for disturbing the peace violated the protestor's First Amendment rights, Justice Arthur Goldberg emphasized the principle "that our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society."[139] Equally important, the ruling repeatedly described the street demonstration metaphorically as a "meeting,"[140] calling forth visual images of a legislative gathering, orderly debate, and the creation of public policy.

Unlike the defendants in *Edwards*, the students in *Cox* had gathered not to lobby for any particular reform but to show support for those who had been arrested. Nevertheless, the assembly metaphor, coupled with a dramatic, speech-friendly frame of understanding, began to generate velocity as the Justices warmed to its potential.

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135. Casting a long shadow over the Court's work until the 1930s was its earlier rejection of any notion that the original Bill of Rights applied to the states in *United States v. Cruikshank*, 92 U.S. 542 (1875). Ironically, *Cruikshank* itself strongly supported the right to assemble and petition for redress: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.* at 552. In *DeJonge v. Oregon*, 299 U.S. 353 (1937) and *Hague v. CIO*, 307 U.S. 496 (1939), the Court finally determined that the right to assemble should be applied to the states, marking an important juncture in the evolution of free speech traditions.

136. 372 U.S. 229 (1963).

137. *Id.* at 236.

138. 379 U.S. 559 (1965).

139. 379 U.S. at 574. Doctrinally, the Court took a major step in this direction in *NAACP v. Alabama*, 357 U.S. 449 (1958), when it arrested the efforts of Alabama officials to force the NAACP to reveal its membership list on pain of ouster from the state. The Court there recognized the "close nexus between the freedoms of speech and assembly" and showed increasing concern about "governmental action which might interfere with freedom of assembly." *Id.* at 461–62; *see also* Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961) ("[F]reedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment.").

140. 379 U.S. at 572-73.

Central to the metaphor's thematic structure is that one incites people, not things. Where the speech-as-fire metaphor treated the People as helpless objects to be rescued by the state, the assembly metaphor now painted a word-picture of a congregation of independent-minded individuals who could resist the "hot-headed speech on the street corner"[141] and thereby save themselves through reason and self-restraint. Indeed, the incandescent image of the People assembling out of doors to seek political change draws from this country's finest democratic and populist traditions. It echoes the founding era, in which citizens organized spontaneously in conventions for the good of the Republic.[142]

The cognitive ideal of the legislative body was thus revitalized by the civil rights movement as it interacted with the arena of law. The era brought the quintessential example of law as street performance: choreographed resistance illuminated the points of contact between governing institutions and human experience, where unjust laws denied to African-Americans basic needs, from food and table fellowship (lunch counters and water fountains), to sustenance for the mind and soul (schoolhouses and libraries).

Peaceful resistance against unjust laws in the streets and the courts not only revolutionized substantive constitutional commitments, entirely reversing the presumption that speech out of doors was a threat to public order, but also irreversibly altered the transformative metaphors and idea-pictures available to a new generation of Americans. Cycles of state repression and non-violent mobilization drove much constitutional innovation during this period, not only in *Cox* and *Edwards*, but also in cases such as *Shuttlesworth v. City of Birmingham*,[143] *NAACP v. Button*,[144] and *Coates v. City of Cincinnati*.[145] These rulings were either co-extensive with or came on the heels of widely publicized rallies, sit-ins, boycotts, and marches, which themselves had drawn inspiration from older political and religious traditions of equality and liberty.[146]

Stitching a new counter-tradition into the constitutional tapestry, the assembly metaphor captured the legal principle that thinking people will not be presumed to rush to violence or illegal activity at the drop of an inflammatory word. More important, it introduced inventive images, counter-scripts, and categories of meaning to a new generation of constitutional actors.

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141. Dennis v. United States, 341 U.S. 494, 568 (1951).

142. The truth about this American tradition of extralegislative activity by the people "out of doors" is more complicated, as it often took the form of unruly crowds and even mob violence. The Framers' appeal to the legitimacy of conventions was an effort to capture a kind of revolutionary zeal. *See* WOOD, *supra* note 134, at 319. Thomas Paine himself had famously argued that "the body of the people . . . have both the right and power to place even the whole authority of the Assembly in any body of men they please; and whoever is hardy enough to say the contrary is an enemy to mankind." *Id.* at 335 (quoting PHILA. GAZETTE, Apr. 3, 1776).

143. 382 U.S. 87 (1965).

144. 371 U.S. 415 (1963).

145. 402 U.S. 611 (1971).

146. *See generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 (1988).

C. SMOKE, BUT NO FIRE

But fire never went away for good, though its absence heralded fundamental changes in speech culture. A pair of speech cases in 1968 and 1969 marked the final crumbling of the metaphorical field that characterized the second era of fire's reign. Fire was an essential fact in the narrative of both cases, but in neither decision did the Court employ the metaphor of fire in its analysis as one might have expected. If anything, the Justices went to great lengths to avoid fire-inspired imagery.

The first noteworthy event was the case of *United States v. O'Brien*.[147] Even though *O'Brien* upheld the conviction of a draft resister for conspicuously burning his draft card on the steps of a Boston courthouse, there was no mention of the Communism cases or of fire.[148] This was all the more striking given the speech-restrictive outcome and the Court's acceptance of the government's argument that tolerating O'Brien's speech-act would undermine the war effort. This omission signaled a newfound reluctance to dwell on the inflammatory nature of speech, and a preference for content-neutral principles. Instead, the Justices agreed the O'Brien's deed was unprotected because the statute was facially speech neutral, it was directed at a legitimate purpose, and its enforcement inhibited an "incidental" amount of expressive activity.[149]

A second dog that did not bark, *Brandenburg v. Ohio*,[150] is often touted as the watershed moment in the evolution of modern First Amendment doctrine. Clarence Brandenburg was a Ku Klux Klan member who gave a speech laden with racial invective at a Klan rally that featured a cross burning. In its 1969 ruling overturning Brandenburg's conviction under Ohio's criminal syndicalism law, the Court firmly held that advocacy of force enjoyed First Amendment protection unless it is "directed to inciting or producing imminent lawless action and is likely to produce such action."[151]

As with *O'Brien*, the per curiam opinion in *Brandenburg* avoided fire imagery where one would expect to find it in abundance. Instead, focusing on stray comments that the rally was "an organizers' meeting," the Court treated the Klan rally like the deliberative actions of a constituted body.[152] The assembly metaphor here illustrated the protective side of the "clear and present danger" standard. That the decision exuded heat but no fire was a testimony to the potency of the assembly prototype in free speech culture by the late 1960s.

Once unleashed in constitutional lore, the linguistic apparatus of the assembly pushed against existing legal standards, metaphors, and folklore, in this case forcing fire to the periphery. Indeed, *Brandenburg*'s move to equate the ideal of

147. 391 U.S. 367 (1968).
148. *See id.* at 377–78.
149. *Id.* at 377.
150. 395 U.S. 444 (1969).
151. *Id.* at 447.
152. *Id.* at 446.

the assembly with the Klan rally—in the absence of any particular message of political reform and notwithstanding the Klan's history of extralegal intimidation and violence—reveals just how far the metaphor of the assembly had been charged with meaning.

What then of fire? Holmes's fire-positive formulation in *Gitlow* does make a short-lived guest appearance in Douglas's concurrence, which uses the witty phrase, "eloquence may set fire to reason" for the first time since *Gitlow*. The saying turned up in one other case,[153] decided two years later, before it took a bow and disappeared back into the constitutional netherworld. We have not seen it on the playbill since.

Lively competition among metaphors helped to deal the fire metaphor—at least its original incarnation—a crippling blow. Where the limits of legal advocacy were at issue, what increasingly mattered doctrinally was the probability that dangerous action would flow *imminently* from incendiary expression; resolution of that question necessitated a review of not just the words themselves, but the entire context. Given the judiciary's newfound emphasis on the actual likelihood that chaos might ensue, it became less useful to blur the line between speech and act through fire imagery.

More broadly, the Justices began to lose interest in patrolling the boundaries of illegal advocacy, the area that would most likely prompt a jurist operating during this period to resort to fire's constitutive properties. Increasingly, they trained their attention on establishing the bounds of obscenity and the degree of state control of public fora.[154] For these modalities of expression, historical practice and the state's regulatory techniques became the topic of inquiry, rather than the propensity of the speech in question to cause events to spiral out of control. By then, the unconscious concern was no longer social chaos writ large, but immorality and the aesthetics of the public square.

IV. THE COURT AS FIREFIGHTER: FLIPPING THE SCRIPT

Every end is a beginning; the forgetting of a metaphor presents the opportunity for recall and recombination. As the 1950s stretched toward the 60s, the Cold War deepened. The Justices, confident in exercising constitutional authority, found themselves buoyed by prosperity at home, waxing American influence on the international stage, and a robust legal culture so carefully cultivated in an earlier age. A different metaphorical field settled over the legal imagination, and language, social norms, and institutional arrangements formed a powerful cultural matrix nurturing constitutional law. This nutrient-rich environ-

153. Samuels v. Mackell, 401 U.S. 66, 74 (1971) (Douglas, J., concurring).

154. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989) (scope of time, place or manner doctrine); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (zoning of adult theaters); Miller v. California, 413 U.S. 15 (1973) (obscenity); Police Dep't of Chi. v. Moseley, 408 U.S. 92 (1972) (labor picketing near schools); Stanley v. Georgia, 394 U.S. 557 (1969) (non-obscene sexually explicit material in the home).

ment stimulated the production of pro-speech traditions and story lines. Seizing the spotlight were restless, active images of citizens gathering and exchanging ideas as if they were currency.

Fire, too, underwent metamorphosis: the script was rewritten and the stage directions for each constitutional actor fine-tuned. Whereas in the first era jurists linked fire with judicial deference to state officials, in the third era they enlisted the myth of fire to justify broad judicial review of state regulation. Rhetorically, the Court moved to assume the mantle of the iconic firefighter in constitutional discourse, guarding the social-legal order against incendiary laws. These profound changes owed more to the ingenuity with which judges manipulated existing cultural forms than to a single catastrophic event.

Utterly transformed through pithy sayings and extended metaphors, fire was turned loose to highlight the limits, desirability, or wisdom of regulation; the repercussions of allowing a challenged speech enactment to stand; and the availability of alternative public policy solutions. Fire-based language embodied and perpetuated an entirely new reality, a social-legal form of life in which the Court sits at the apex of free speech power.

A. BURNING DOWN THE HOUSE TO ROAST THE PIG

A common aphorism, "burning down the house to roast the pig," developed into a multipurpose implement in its own right during the third era.[155] A favorite saying of Justice Frankfurter's, it served as the vehicle by which legal actors kept the mythology of fire culturally relevant through reinvention.

Its origins are apocryphal. As recounted by the Victorian essayist and poet

155. *See, e.g.*, Ashcroft v. ACLU, 535 U.S. 565, 605 (2002) ("In evaluating the overbreadth of such a statute, we should be mindful of Justice Frankfurter's admonition not to 'burn the house to roast the pig.'") (Stevens, J., dissenting); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 581 (2001) ("Surely, this is to burn the house to roast the pig. We have held consistently that speech 'cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'"); Reno v. ACLU, 521 U.S. 844, 882 (1997) ("In *Sable*, we remarked that the speech restriction at issue there amounted to 'burn[ing] the house to roast the pig.' The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community."); Sable Communications v. FCC, 492 U.S. 115, 127 (1989) ("As Justice Frankfurter said in that case, '[s]urely this is to burn the house to roast the pig.' In our judgment, this case, like *Butler*, presents us with 'legislation not reasonably restricted to the evil with which it is said to deal.'") (citation omitted); Bolger v. Young Drugs Prods. Co., 463 U.S. 60, 74 n.27 (1983); FCC v. Pacifica Found., 438 U.S. 726, 766 (1978) (Brennan, J., dissenting) ("[I]t is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is clearly . . . 'to burn the house to roast the pig.'"); Moore v. City of East Cleveland, 431 U.S. 494, 521 n.16 (1977) ("[T]raffic congestion can be reduced by prohibiting on-street parking. To attack these problems through use of a restrictive definition of family is, as one court noted, like 'burn[ing] the house to roast the pig.'") (Stevens, J., concurring); Butler v. Michigan, 352 U.S. 380, 383 (1957) ("[Q]uarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, [the state] is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig."); United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers, 352 U.S. 567, 596 (1957) (deploying adage to show that the Court erred in holding that federal law prohibited use of union dues for political ads) (Douglas, J., dissenting).

Charles Lamb in a tale brimming with nineteenth century orientalism,[156] the art of broiling meat was accidentally discovered by an elderly Chinese man named Ho-ti and his son Bo-bo, who had a habit of playing with fire.[157] The legend is set "seventy thousand ages" ago in a village whose inhabitants still devoured meat raw. One day while the father was away, the son allowed sparks to escape into a bundle of straw, torching the family cottage, and along with it, an entire litter of piglets. Distraught, Bo-bo sat amidst the ruins. Burning his fingers on the blackened carcass of a pig, he quickly put his fingers to his mouth. To his delight, he found the flavor wonderful. When the father returned, he too tasted the delicious roast suckling pig. All was quickly forgiven. As the two tried to replicate the accident, Lamb writes, "Ho-ti's cottage was burned down now more frequently than ever. Nothing but fires from this time forward."[158]

At that point, the story took a legal turn. Father and son were charged with arson by the authorities. At the trial, the jurors asked to handle the evidence. Somehow, they singed their fingers on the exhibits, and cooled them by applying them to their mouths. In the face of overwhelming evidence of the pair's guilt, the jury nonetheless acquitted them. Afterward, the judge, a rather shrewd fellow, bought up all the pigs in the region, and "[i]n a few days his Lordship's townhouse was observed to be on fire."[159] What started as a tasty morsel discovered by the working class became a delicacy savored by the upper class behind closed doors, and soon all sectors of society were practicing the dangerous art of firing houses for a chance to sample roast pig: "The thing took wing, and now there was nothing to be seen but fires in every direction."[160] Only with the advent of broiling technology, Lamb reports, did the fever finally lift.

This well-formed phrase illustrates the permeability of legal language: from a fantastical account emerged a catchy aphorism, which in turn was honed into a finely wrought implement of judicial influence. Inspired, no doubt, by Lamb's tall tale, Justice Frankfurter began sprinkling the lessons learned into dissenting opinions involving questions of antitrust law and the right to a jury trial.

In its first incarnation in *Thiel v. Southern Pacific Co.*,[161] the adage appeared as "burning down the barn to roast a pig."[162] A year later, Frankfurter shrewdly

156. Coined by Edward Said, "orientalism" characterized the nineteenth century Englishman's perspective of the colonized East: exotic, unspoiled, and awaiting enlightenment. EDWARD SAID, ORIENTALISM 1–3 (1979).

157. Charles Lamb, *A Dissertation upon Roast Pig*, *in* 1 ESSAYS OF ELIA 242 (1903). The essay first appeared in an 1823 issue of *London Magazine*, and waxes lyrical about the joys of eating roast suckling pig.

158. *Id.* at 245. For another thoughtful account in the field of law and food, see Mark S. Weiner, *The Semiotics of Civil Rights in Consumer Society: Race, Law, and Food*, 16 INT'L J. FOR SEMIOTICS L. 395 (2003).

159. *Id.* at 245–46.

160. *Id.* at 246.

161. 328 U.S. 217 (1946).

162. *Id.* at 234 (Frankfurter, J., dissenting) (stating, in a challenge to composition of jury in which all wage earners were excluded, "To reverse a judgment free from intrinsic infirmity and perhaps to put in

modernized the saying by replacing the barn with the more evocative and commonplace house.[163] Given the post-war boom, the rise of home ownership,[164] and the decline of the agrarian economy, a burning house certainly offered a more potent mental image than its predecessor.

The first appearance of the old saw in a free speech case came in *American Communications Association v. Douds*,[165] which upheld a provision of the Labor Management Relations Act that conditioned union recognition on officers' swearing an oath that they did not belong to any organization that believed in the overthrow of the government. Writing separately, Frankfurter painted a vivid picture of home and pig engulfed in flames to make the point that Congress's use of overly vague terms threatened to undermine the very form of government that Congress sought to safeguard through the Act's enactment.

Seven years later, in *Butler v. Michigan*,[166] the Court applied a glaze of institutional legitimacy to the image of pig and home headed for hell together. Butler was convicted for selling obscene or immoral literature "manifestly tending to the corruption of the morals of youth." Setting the man free on free speech grounds, Justice Frankfurter seized the opportunity to recite the incantation with the full force of law.[167] Thereafter, jurists dispatched the legal chestnut with greater regularity.

Two intriguing variations of the house-on-fire metaphor deserve brief mention. In 1951, Justice Jackson trotted out an especially explosive version: "[S]ilencing a speaker by authorities as a measure of mob control is like dynamiting a house to stop the spread of a conflagration."[168] In a case involving the disclosure of grand jury materials, Chief Justice Warren Burger highlighted the distance between ends and means by describing the majority's ruling as "burning down the house to get rid of a mouse."[169] Neither saying is quite as pithy as the roast pig formula and both appeared in dissents, which is probably why they have never been repeated by the Justices.

Today, the roast pig incantation is loosed by constitutional actors to bolster the point that a challenged law is overly broad or otherwise poorly suited to the state's interests, or that a law cannot be saved by the government's salutary

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question other judgments based on verdicts that resulted from the same method of selecting juries, reminds too much of burning the barn in order to roast the pig"); *see also* Int'l Salt Co. v. United States, 332 U.S. 392, 403 (1947) (Frankfurter, J., dissenting) ("But the law also respects the wisdom of not burning even part of a house in order to roast the pig. Ordinarily, therefore, when acts are found to have been done in violation of antitrust legislation, restraint of such acts in the future is the adequate relief.").

163. *Int'l Salt*, 332 U.S. at 403.

164. *See* STANLEY GREENBERG, MIDDLE CLASS DREAMS 26-29 (1995).

165. 339 U.S. 382, 419 (1950) (Frankfurter, J., concurring) ("These restrictions on the broad scope of legislative discretion are merely the law's application of the homely saws that one should not throw out the baby with the bath or burn the house in order to roast the pig.").

166. 352 U.S. 380 (1957).

167. *Id.* at 383.

168. Kunz v. New York, 340 U.S. 290, 302 (Jackson, J., dissenting).

169. United States v. Sells Eng'g, Inc., 463 U.S. 418, 468 n.11 (1983) (Burger, C.J., dissenting).

motives alone, or that a law unjustifiably restricts adult expression to that which is fit only for children. [170]

This legal mantra inaugurated a new linguistic field in free speech culture, as fire was harnessed to advance expressive liberty. The act of roasting a pig stands for the benign purpose of the government, while the metaphorical house—so often used to represent law—signifies our constitutional order, inadvertently set ablaze through the actions of well-intentioned officials. We shake our heads at the foolishness displayed by the state's position, and we are thankful that the Court stands ready to put the world right.

The incantation's magical quality lies in the fact that one need not be steeped in its literary pedigree to comprehend its implications.[171] Memorable and succinct, the aphorism is accessible to the ordinary citizen.[172] The moment this formula is recited, a reader feels at once that the constitutional player figuratively described as the roaster of pigs does not have our best interests in mind. One gets the distinct impression that the party so described is prone to excess and inclined to risk the health of the constitutional order in his single-minded obsession, just as the short-sighted protagonists in the tale sacrificed security and safety for a rare but ephemeral culinary treat. The well-intentioned would-be firefighter is revealed to be a bumbling arsonist of the worst sort!

A pro-speech use of fire, the legal mantra burst forth from the transitional post-war period with a vengeance. Americans heard it chanted by the Court once in each of the three decades following the Second World War, twice in the 1970s, and then repeatedly in the 1980s and 1990s as constitutional idiom and metaphor urged each other onward with greater intensity.

B. REVEALED: THE STATE AS ARSONIST

The house-on-fire metaphor was joined by the regulation-as-fire metaphor as fire imagery became increasingly pronounced in the past two decades. One of the most stirring renditions of the reconfigured language of fire can be found in *Texas v. Johnson*,[173] in which the Supreme Court held that flag burning was a protected form of symbolic expression. At a crucial moment in Justice William

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170. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 581 (2001) (using phrase to limit rationale of protecting children); Sable Communications v. FCC, 492 U.S. 115, 127 (1989) (invoking mantra to underscore poor fit between state's ends and means); Moore v. City of East Cleveland, 431 U.S. 494, 521 (1977) (emphasizing that the laudatory goal of avoiding traffic congestion is insufficient).

171. Ironically, Lamb himself concluded that "it must be agreed, that if a worthy pretext for so dangerous an experiment as setting houses on fire (especially in these days) could be assigned in favour of any culinary object, that pretext and excuse might be found in ROAST PIG." Lamb, *supra* note 157, at 246.

172. The media have called the roast pig adage a "memorable metaphor," and rarely fail a chance to repeat it in coverage of the Court's decisions or oral argument when it appears. *See, e.g.*, David Post & Bradford C. Brown, *On the Horizon: Confusion Reigns Where Law Meets Cyberspace*, INFORMATION WEEK, June 24, 2002, *available at* http://www.informationweek.com/story/IWK20020621S0009; *see also* John Schwartz, *Justices Hear Arguments on Internet Pornography Law*, N.Y. TIMES, Mar. 3, 2004, at A14 (reporting advocate's use of roast pig mantra in oral arguments before Supreme Court).

173. 491 U.S. 397 (1989).

Brennan's opinion for the Court, we are reminded of "one of the proudest images of our flag, the one immortalized in our own national anthem, . . . the bombardment it survived at Fort McHenry."[174]

This searing picture of the flag waving as the sky exploded in pyrotechnics appealed to fire's destructive properties, as well as to its enduring and transformative qualities. It drew upon the creation myth of the Star Spangled Banner, a mainstay of American ritualism memorialized in popular images of liberation from British rule[175] and ceremoniously re-enacted at sporting events and civic gatherings. A symbol of unity and independence, the flag also signifies triumph in the face of overwhelming odds. Our lasting impression is of the flag as an eternal beacon: intact, even supernatural, untouchable by would-be flag burners.

Another splash of fire in *Johnson* invited citizens and public officials to react to the Court's interpretive act with approval rather than dismay:

> We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial.[176]

Beautifully arranged, the Court's words expanded the range of possible reactions to flag burning beyond violence and suppression. Blending patriotism and fire, the incandescent flag urged other constitutional actors to honor it by saluting and interring it, rather than by fetishizing any particular physical representation of the flag.

Despite Chief Justice William Rehnquist's best efforts, he failed to convince a decisive number of his colleagues that flag burning was "so inherently inflammatory that it may cause a breach of the public order."[177] The appearance of this rhetorical remnant of the first epoch in Rehnquist's dissent therefore accentuated the dominance of the existing pro-speech field.

These trends in fire-centered rhetoric can be further traced in a pair of decisions on cross burning and online expression, separated by five years. In *R.A.V. v. City of St. Paul*,[178] the Supreme Court invalidated a local anti-bias ordinance that had outlawed the display of any symbol, such as a burning cross or swastika, "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion

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174. *Id.* at 419.

175. There are countless popular depictions of this historical moment when "bombs bursting in air" gave "proof through the night that our flag was still there." *See, e.g., Birthplace of Our National Anthem, at* http://www.bcpl.net/~etowner/anthem.html (last visited June 1, 2004) (website devoted to Fort McHenry); *A Star-Spangled Banner Weekend, at* http://www.bcpl.net/~etowner/ssbintro.html (last visited June 1, 2004).

176. 491 U.S. at 419–20.

177. *Id.* at 431 (Rehnquist, C.J., dissenting).

178. 505 U.S. 377 (1992).

or gender."[179] Justice Antonin Scalia, who penned the 1992 opinion for the Court, has a fondness for pyrotechnics. Three years earlier, in *City of Richmond v. J.A. Croson*,[180] the Court had struck down a municipality's affirmative action program under the Equal Protection Clause. Staking out a stricter race-neutral vision of the Constitution than the plurality, Scalia warned: "When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns."[181]

Fire now fanned back across the free speech landscape. Striking down the St. Paul ordinance, the Court provocatively interwove the fear-inspiring image of the burning cross thrust in the black family's yard with an image of flames consuming the First Amendment:

> Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.[182]

In a single startling stroke, the Justices underscored what they believed to be the destructive quality of the ordinance, diverted our attention from the victims of this particular cross-burning toward abstract, foundational principles, and suggested that allowing the law to stand would do more injury to others not before the Court.[183]

Moreover, just as Chief Justice Rehnquist failed in *Texas v. Johnson* to have flag burning treated as an "inflammatory" speech-act, so too, Justice Stevens could not muster sufficient support for a pro-regulatory version of the fire metaphor. Stevens's concurrence in *R.A.V.* unsuccessfully argued that "[a]lthough it is regrettable that race . . . is so incendiary an issue, until the Nation matures beyond that condition, laws such as St. Paul's ordinance will remain reasonable and justifiable."[184]

Consider, for a moment, how the ritual dance of constitutional authority has

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179. *Id.* at 380.

180. 488 U.S. 469 (1989).

181. *Id.* at 527 (Scalia, J., concurring in the judgment). Justice Scalia's reference to Johnson, DeFunis, and Croson burning is best read not as an accusation that precedents are being disregarded (*Croson* was not yet a precedent), but as a suggestion that the interests of these parties, which are metaphorically on fire, pale in comparison to the even greater harm that flows from judicial tolerance of race-based remedies, which he called "the source of more injustice still." *Id.* at 527–28. Moreover, Scalia's quotation of Douglas's words in *Defunis* lauding the ideal of color blindness suggests that he was influenced by Douglas's portrait of racial anarchy.

182. 505 U.S. at 396.

183. Judith Butler has written that the *R.A.V.* Court paints itself "as an opponent of those who would set the Constitution on fire, cross-burners of a more dangerous order." JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 55 (1997). I would not go so far as to accuse the Court of suggesting that opponents of cross burning are themselves cross burners, but I do agree with Butler's basic point that the rhetoric of fire draws and redirects our attention in ways that characterize and prioritize these incommensurable experiences.

184. 505 U.S. at 434 n.9 (Stevens, J., concurring in the judgment).

been reconfigured. In *R.A.V.*, as in *Croson*, the fire to be feared is no longer the expression at issue but the challenged regulation. If not stamped out, the extended fire metaphor suggests, the regulatory flames will consume our First Amendment freedom, which is now treated as the lynchpin of our constitutional order.

Although the metaphor still harnesses fire's negative properties, its accompanying script has been completely rewritten and the scenes reblocked in order to animate pro-speech norms:

> Regulation-as-fire threatens the constitutional order → Direct conflict arises between the Court and another state actor → Judicial authority is dispensed to meet the threat → Invalidating the state action repairs the breach.

Each part in the fire dance of constitutional authority has been boldly recast. In earlier eras, the extended metaphor cast the state in the part of the heroic firefighter, who took on the "hotheaded speech on the street corner" or the purveyor of creeping ideologies. Now, it is the Court-as-firefighter who steps in to prevent the state, the newest constitutional arsonist, from "adding the First Amendment to the fire" or "burning down the house." The metaphor's performativity elicits the sympathetic feelings of welcome and gratitude we once felt for the state in the first and second eras, replaced by an abiding distrust of the state-as-arsonist during the third epoch of fire's reign. Consequently, the warm sentiments for the state have been transferred to the Court, which is now trusted to know what is best for the legal order.

By the time *R.A.V.* reached the Supreme Court, the growth in First Amendment law and mythology had enhanced the institutional stature of the judiciary. These changes, in turn, had precipitated a major shift in the basic culture-bearing tools employed by the Court to make its authority known—not simply the doctrines and arguments available to jurists, but also the stories and symbols in the rhetorical toolkit.

The meaning-performing cycle does not stop there. Emboldened, the Court over the years has pursued its rhetorical strategies with great success, gradually ensconcing itself as the final arbiter of our constitutional values. Whether or not we are content with this state of affairs (I, for one, have reservations), there is no denying that we have arrived at this point through cycles of authority assertion, linguistic borrowing, and cultural acquiescence.

But repetition does not deny or destroy the space for rhetorical autonomy. While the social forces acting upon the legal arena may be intense, one does not always see fire where it is expected; and when it does appear, there is no guarantee that the fire motif will be deployed in precisely the same manner.[185]

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185. There are numerous instances of speech described in pyrotechnic terms throughout the years. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 846 (1991) (stating that victim impact statements can "inflame" the jury); Andrews v. Shulsen, 485 U.S. 919, 921 (1988) (Marshall, J., dissenting from denial

That fire is a basic fact in the factual background does not mean that an opinion writer will always use the fire metaphor as a way of structuring legal discourse. If fire's absence in *Brandenburg* and *O'Brien* was not sufficient to prove the point, the Court's second go-round with cross burning in *Virginia v. Black*[186] should do the trick. This time, the Justices upheld a statute that was carefully drawn to avoid the problems of viewpoint discrimination and overbreadth: the law banned the burning of a cross "with the intent of intimidating any person or group of persons."[187] Justice Sandra Day O'Connor's opinion for the Court declined to recapitulate *R.A.V.*'s shocking depiction of the flaming cross, and ignored demands by the parties to draw upon the myth of fire.[188] Instead, the most prominent image found in the ruling is that of the political rally, where, depending on the circumstances, burning a cross may or may not arouse anger or hatred, and the speech act may be intended as either a true threat or a "statement of ideology, a symbol of group solidarity."[189]

Both the dominant marketplace metaphor and the re-invigorated fire metaphor were launched into cyberspace by *Reno v. ACLU*,[190] the landmark decision establishing that First Amendment principles restrain government regulation of the technology that made possible a "unique and wholly new medium of worldwide human communication."[191] The Communications Decency Act (CDA) prohibited the transmission of obscene or indecent material to persons under the age of 18. Justice John Paul Stevens' opinion for the Court described the Internet as a "new marketplace of ideas," an exciting forum of boundless social

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of cert.) (arguing that "incendiary drawing" may have infected jury deliberations); Murphy v. Florida, 421 U.S. 794, 802 (1975) (stating that "inflammatory" atmosphere in courtroom did not rise to level such that it denied defendant a fair trial); *In re* Little, 404 U.S. 553, 555 (1972) ("The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice."); Manual Ents. v. Day, 370 U.S. 478, 500 n.6 (1962) (Brennan, J., dissenting) (recounting Congress's rejection of President Jackson's request to suppress distribution of "incendiary abolitionist literature").

186. 538 U.S. 343 (2003). Similarly, one searches in vain for the extended fire metaphor in *United States v. Eichman*, 496 U.S. 310 (1990), a flag-burning case.

187. 538 U.S. at 348. The Court rejected a reading of *R.A.V.* that would have doomed the statute simply for singling out cross burning. Rather, it ruled that Virginia could legitimately "choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence." *Id.* at 363. The Court invalidated a separate provision that required the jury to treat the fact that a cross had been burned as prima facie evidence of intent to intimidate. *Id.* at 364.

188. The respondents in *Black* stated, "It is not the fire that burns hotter when flaming sticks are crossed, but the passions that the fire inflames." Brief of Respondent at 6 (No. 01-1107). They urged the Court, á là *R.A.V.*, not to "add . . . the First Amendment to the flames." *Id.* at 4. The filings of amici struck the same theme. *See, e.g.*, Brief of Amicus Curiae The Thomas Jefferson Center for the Protection of Free Expression at 16 (No. 01-1107).

189. 538 U.S. at 354. From the outset, the opinion narrated a complicated history of cross burning as an ancient Scottish call to arms, a symbol of racial terror, and a rallying emblem of socio-political ideology. Accordingly, the Court concluded that "a burning cross does not inevitably convey a message of intimidation." *Id.* at 355.

190. 521 U.S. 844 (1997).

191. *Id.* at 850.

utility, where the goods in trade are as "diverse as human thought."[192] This move portrayed the Internet as a vibrant bazaar where persons trading in information transact business on relatively equal footing, rather than as a dark, shifting, secretive place where dangers to the unwitting child lurk in every corner.

In a momentous passage in which the Court rejected the government's argument that available statutory defenses ameliorated the damage to free speech principles, we again see fire crackle and leap from the text:

> In *Sable*, we remarked that the speech restriction at issue there amounted to "burn[ing] the house to roast the pig." The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.[193]

Frankfurter's roast pig mantra was thus joined by an extended fire metaphor. Arranged in this fashion, the composition signals that speech no longer poses the primary cognitive danger; rather, it is the regulation of speech that has become the spark, the everpresent threat to our way of life. As in *R.A.V.*, we see in our mind's eye the steadfast Court, dutifully hosing down the part of the World Wide Web set ablaze by Congress, which is so often cast in the role of the villain in our collective imagination today.

A metaphoric overlay cements these associated doctrinal ideas:

> regulate: torch::
> restrained: overbroad::
> freedom: tyranny::
> speaker: state::
> order: chaos::
> constitutional: unconstitutional.

Establishing two opposing networks of legal categories, the regulation-as-fire metaphor signals that the state can carefully regulate spheres of life in a way that is consistent with freedom, individual expression, and order. Or it can take overly broad action, torch our legal order, and invite long-term instability.

C. SPREADING LIKE WILDFIRE: POPULAR TRANSMISSION

Speaking of Holmes's opinions in the wartime decisions, Harry Kalven remarked that their "extraordinary prose . . . contributed beyond measure to the charisma of the First Amendment."[194] Yet culture-bearing institutions, leading thinkers, lawyers, judges, activists, and the media had a greater hand in burnishing the power of free speech iconography. Each of these actors perpetuated the

192. *Id.* at 852, 885.
193. *Id.* at 882.
194. KALVEN, *supra* note 43, at 156.

legal myth of fire in popular culture, tailoring it to suit their pro-expression or pro-regulation needs.

In intellectual circles, First Amendment theorists have done their part by praising the aesthetically pleasing quality of the fire metaphor, while at the same time discounting its doctrinal value. Many of these commentators have misunderstood that the cultural force of legal language derives from more than its analytic utility. Ironically, their repetition of fire-inspired language has actually helped to spread the myth of legal fire farther.

Shortly after its initial appearance in the wartime rulings, Ernst Freund called the "fire in a crowded theater" analogy unsuitable for political offenses.[195] Of fire's appearance in *Schenck*, Kalven deemed it entirely "misleading."[196] These criticisms, which only quickened over time, had the effect of disseminating the fire metaphor broadly, softening the harsh doctrinal rules established in those early rulings, and preparing the constitutional ecosystem for more speech-friendly signs and word-pictures.

In law schools—important social institutions helping to sustain legal culture—educators rarely fail to linger over the doctrinal ramifications of the Justices' fire-inspired rhetoric or to develop it along new lines.[197] Consequently, each generation of law students has entered the profession equipped with the cultural bricolage necessary to further replicate the iconography of fire, which thereby maintains its centrality to First Amendment theater.

Each political movement to rein in speech rules, too, has advanced the legal myth of fire, from organized efforts to stem the tide of pornography and confront the problem of hate speech, to grass-roots mobilization in support of a constitutional amendment outlawing flag-burning.[198]

By the time Tom Stoppard parodied the fire-in-a-crowded-theater mantra in the 1960s, it had become a staple of free speech lore. In the play *Rosencrantz and Guildenstern are Dead*, which features two minor figures from *Hamlet*, one character steps to the front of the stage and shouts, "Fire!"[199] Another asks, "Where?" whereupon the first character replies, "It's all right—I'm demonstrat-

195. Ernst Freund, *The* Debs *Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13.

196. KALVEN, *supra* note 43, at 133–34; *see also* William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 113–14 (1982) (evincing counterexamples to Holmes's analogy).

197. *See, e.g.*, ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE (2002); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 827 (2001) ("[S]peech that advocates lawbreaking can be punished only when it is like the proverbial match held to the tinderbox—or only, to use another familiar image, when it is like falsely shouting fire in a crowded theater").

198. *See, e.g.*, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 377 (1991) (employing the theater fire mantra to justify codes prescribing racist speech); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 24 n.44 (1985) (invoking same image in support of regulation banning speech driven by desire to subordinate others); Citizens' Flag Alliance Inc., *What We Believe*, *at* http://www.cfa-inc.org/ frontpage_additions/fp_2.htm (last visited June 1, 2004) (equating flag burning to falsely shouting fire in crowded theater).

199. Tom Stoppard, ROSENCRANTZ AND GUILDENSTERN ARE DEAD, Act II, at 60 (1967).

ing the misuse of free speech. To prove that it exists."[200] No real proof was necessary in 1967 when the play opened, nor was there any real doubt two decades later that a hearty ethos of free expression reigned as constitutional actors rewired the fire metaphor for pro-speech responsibilities.

Litigants and friends of the Court regularly reworked the fire metaphor, urging the Justices to embrace their preferred socio-legal categories. In *R.A.V.*, the Anti-Defamation League of B'nai B'rith filed an amicus brief arguing that cross burning "was a red-hot searing action, pregnant with meaning to the victims, which meaning was clearly understood by both perpetrator and victims."[201] As we know, the Court refused this pro-regulation metaphor in its actual ruling, instead opting for the image of the state "adding the First Amendment to the fire."

R.A.V.'s rhetorical legacy overshadowed the proceedings over cross burning a decade later. On one level, the briefs in *Virginia v. Black* dueled over legal principles; on another level, they engaged a pitched battle over fire metaphors. Urging the Justices to treat the Virginia law as they had St. Paul's antidiscrimination ordinance, the individuals convicted under the cross-burning statute and their supporters recycled the regulation-as-fire metaphor.[202] In response, the Commonwealth insisted that the burning cross merited special treatment because it "takes fire—an archetype of destruction—and marries it with a deeply evocative icon of Christianity, transmogrifying a sign of heavenly assurance into a hellish threat."[203] Consequently, "[t]he chief passion thus inflamed is the victim's fear."[204] Closing the circle, the Commonwealth's attorneys dutifully chanted the theater fire mantra.[205]

It would be no exaggeration to say that the Internet decisions of the last decade,[206] and the far-reaching technology shielded by those rulings, have had perhaps the greatest impact on the spread of First Amendment mythology. Prominent watchdog organizations and think tanks have utilized the Web as part of litigation strategy and public education to great effect.

Even before the Justices heard argument on the CDA, *Wired* magazine proclaimed that "Congress and the President have decided to hold a pig roast, and they're burning down the house in the process."[207] And Judge Stewart

200. *Id.*

201. Brief of Amicus Curiae Anti-Defamation League of B'nai B'rith in Support of Respondents at 12, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (No. 90-7675).

202. *See* Brief of Respondents at 4, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107); Brief of Amicus Curiae The Thomas Jefferson Center for the Protection of Free Expression in Support of Respondents at 16, *id.*

203. Brief of Petitioner at 34, *id.*

204. Reply Brief of Petitioner at 9, *id.*

205. Brief of Petitioner at 35, *id.*

206. United States v. Am. Library Ass'n, 539 U.S. 194 (2003); Ashcroft v. ACLU, 535 U.S. 564 (2002); Reno v. ACLU, 521 U.S. 844 (1997); American Civil Liberties Union of Georgia v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997).

207. Todd Lappin, *The First Amendment, New Media, and the Supreme Court*, WIRED, Spring 1996.

Dalzell, who served on the three-judge panel that originally heard the case, insisted that "[a]ny content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig."[208] When the controversy entered its final stage before the Supreme Court, litigants and friends of the Court marshaled fire metaphors to accompany their doctrinal weaponry.[209]

Stimulated by the Supreme Court's generous use of the fire metaphor in its ruling, grateful advocacy groups—especially those who toil in the name of the liberty tradition—have disseminated it far and wide. Shortly after the decision in *ACLU v. Reno* gave the semiotics of fire momentum in the new age, the ACLU published a paper against Internet filtering software titled *Fahrenheit 451.2: Is Cyberspace Burning?,* which warned that the "dense smoke" rising from state use of such technology "may torch free speech on the internet," and that "[t]he fire next time may be more difficult to detect and extinguish."[210]

Others have deftly taken up the theme.[211] Decrying the Court's 2002 decision to uphold a congressional extension of copyright terms, Lawrence Lessig argued that "we don't 'burn the house to roast the pig'. . . . not even to save a mouse."[212]

In March 2004, the Justices engaged in a spirited oral argument over the constitutionality of the Child Online Protection Act, which a federal panel had twice overturned on free speech grounds. Enacted in the aftermath of *Reno v. ACLU*, the statute required commercial web publishers to take good faith measures to keep material harmful to minors from the eyes of children. Many of the exchanges at the argument revolved around the degree to which protected online sexual expression is actually captured by the law and whether it is feasible for Congress to adopt less intrusive measures to protect minors—matters central to the doctrinal issues before the Court. Simultaneously, the advocates offered opposing free speech symbols. At the close of her presenta-

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208. ACLU v. Reno, 929 F. Supp. 824, 882 (E.D. Pa. 1996) (Dalzell, J., concurring).

209. *See* Brief of Appellees at 16, *Reno*, 521 U.S. (No. 96-511); Brief of Amici Curiae Association of National Advertisers, Inc. and the Media Institute. in Support of Appellees at 8, 10, *id.*; Brief of Amici Curiae American Association of University Professors in Support of Appellees at 6, *id.*

210. American Civil Liberties Union, *Fahrenheit 451.2: Is Cyberspace Burning: How Rating and Blocking Proposals May Torch Free Speech on the Internet*, *available at* www.aclu.org/Cyber-Liberties/Cyber-Liberties.cfm?ID=9997&c=55 (arguing that "burning down the house to roast the pig . . . is exactly what a library does when it installs censorware"). This cause was largely lost, at least in the legal arena, as a result of the outcome of *United States v. American Library Association*, 539 U.S. 194 (2003), in which the Court rejected the plaintiffs' suggestion that imposing filtering technology on the Internet was akin to granting access to a worldwide library but selectively ripping out pages of books whose contents were offensive. Instead, the Justices treated the decision to filter like the initial content-driven decision to acquire new materials for a library's collection. *Id.* at 206.

211. *See, e.g.*, The Censorware Project, *Blacklisted by Cyberpatrol: From Ada to Yoyo, at* http://censorware.net/reports/cyberpatrol/libraries.html (last visited June 1, 2004).

212. The case is *Eldred v. Ashcroft*, 537 U.S. 186 (2003). *See, e.g.*, Lawrence Lessig, *Copyright Law and Roasted Pig*, RED HERRING, Oct. 22, 2002, *available at* http://www.lessig.org/content/columns/red2.pdf. Lessig argued that this congressional practice, which prevents ideas and images such as that of Mickey Mouse from unauthorized use in the public sector, stifles creativity and threatens free speech values.

tion, Ann Beeson, counsel for the plaintiffs-respondents said simply, "[T]he government can't burn down the house to roast the pig."[213] She unleashed the legal mantra to counter the fearful image offered up by Solicitor General Ted Olson of the unwitting child corrupted by sexually explicit materials, which has long driven the law of obscenity.

The Justices evidently paid close attention, for they sustained a preliminary injunction against the law.[214] Although their ruling did not repeat the roast pig mantra, it did pay homage to a broad vision of First Amendment liberty exemplified in the legal saying, treating commercial speech like other forms of expression.

V. WARRING METAPHORS OVER TIME

Until now, I have purposefully said little about the marketplace metaphor, perhaps the single most recognized metaphor in all of constitutional law,[215] and certainly one that is frequently criticized for its influence on First Amendment thought.[216] I now offer a few reasons as to why the marketplace metaphor supplanted the fire metaphor in the constitutional lexicon. Resisting an understanding of metaphors as self-contained theories, I then discuss why competition between metaphors is essential to the creation of legal culture. I conclude by sharing a few concerns about the ascendance of metaphors and images that reinforce the Supreme Court's place at the center of constitutional life.

A. THE MARKETPLACE ASCENDANT

Rooted in laissez-faire economic theory of decidedly older vintage, the speech-as-commodity metaphor was born in 1919, in Justice Holmes's famous dissent in *Abrams v. United States*, in which he urged "free trade in ideas."[217] Despite Holmes's memorable formulation, the metaphor remained simply a string of words on a page for another quarter century. It was not embraced by

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213. *See* John Schwartz, *Justices Hear Arguments on Internet Pornography Law*, N.Y. TIMES, Mar. 3, 2004, at A14.

214. Ashcroft v. ACLU, 124 S.Ct. 2783 (2004).

215. Some might wager instead on the popularity of the "wall of separation between church and state," but I would take my chances with the "marketplace of ideas."

216. *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 75–77 (1993) (arguing that market metaphor has frustrated equality principle); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 26-27 (1993) (comparing Holmes's market metaphor unfavorably to Brandeis's republican-centered conception of free expression); C. Edwin Baker, *Toward a General Theory of the First Amendment*, 62 IOWA L. REV. 1, 6 (1976) (arguing that marketplace image fails to take account of value of "self-realization"); Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 U.C.L.A. L. REV. 949, 963 (1995) ("Speech is an interaction arguably akin not to sales but to government.").

217. 250 U.S. 616, 630 (1919). Although attribution of the phrase to John Stuart Mill is *de rigueur*, Mill wrote that truth would prevail in a competition between ideas, not because of market forces. J.S. MILL, ON LIBERTY 76 (1859). *See generally* Jill Gordon, *John Stuart Mill and the Marketplace of Ideas*, 23 SOC. THEORY AND PRAC. 235 (1997) (showing that Mill neither used the phrase "marketplace of ideas" nor espoused free market theory with regards to speech).

the Court and deployed with the force of law until 1945,[218] when the Justices overturned a contempt order against a national labor leader for failing to register with the secretary of state before traveling to Texas to urge listeners to join the union.[219] "'Free trade in ideas,'" Justice Wiley Rutledge explained in *Thomas v. Collins*, "means free trade in the opportunity to persuade to action, not merely to describe facts."[220]

Once Justice Brennan dropped the phrase "marketplace of ideas" into his concurring opinion in the 1965 case *Lamont v. Postmaster General*,[221] the floodgates opened, and the marketplace rapidly became the metaphor of choice in First Amendment decisions, easily outdistancing fire and assembly.[222] Still, it is often the case that jurists will mix their metaphors in mutually reinforcing ways or wield one metaphor against another. As the market metaphor steadily ascended to its place of prominence in the American mind and extended its domain over First Amendment culture, it also strengthened the metaphor of the assembly.[223]

Several factors fueled the sudden climb in popularity of the market metaphor in constitutional discourse. First, ironically, the market metaphor's initial message of hands-off libertarianism made it a tempting rhetorical instrument for a court and a nation ready for greater judicial involvement in the administration of our free speech regime. Cloaking the courts in a mantle of neutrality, the metaphor infused interpretations with the image of the "invisible hand" of market forces.

Second, domestic circumstances—periods of prosperity as well as economic stagnation—helped to keep the language of economics on the tip of every constitutional actor's tongue. Just as economic upheavals molded the contours of constitutional language in the 1930s, so the cycles of prosperity and recession

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218. A deepening dissatisfaction with the brand of laissez faire theory associated with *Lochner v. New York*, 198 U.S. 45 (1905), may very well have tempered any inclinations to reach for market-based language in speech cases until this time.

219. Thomas v. Collins, 323 U.S. 516 (1945).

220. *Id.* at 537. Between 1919 and 1945, the phrase appeared only once, and the Court raised the metaphor only to reject it as inapposite for the courtroom setting. *See* Bridges v. California, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting) ("A trial is not a 'free trade in ideas', nor is the best test of truth in a courtroom 'the power of the thought to get itself accepted in the competition of the market.'").

221. 381 U.S. 301 (1965). As Brennan put it: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308.

222. By my count, the phrase "marketplace of ideas" or "free trade in ideas" appears in 66 separate cases since 1965, from *Lamont* through *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

223. *See, e.g.*, Rutan v. Republican Party of Illinois, 497 U.S. 62, 91 n.8 (1990); Anderson v. Celebrezze, 460 U.S. 780, 794 (1983); NAACP v. Claiborne Hardware, 458 U.S. 886, 908 (1982); *In re* Primus, 436 U.S. 412 (1978); Healy v. James, 408 U.S. 168, 180–81 (1972); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 517 (1969); Keyishian v. Bd. of Regents, 385 U.S. 589, 602 (1967); Brown v. Louisiana, 383 U.S. 131, 143–47 (1966) (Brennan, J., concurring); NAACP v. Button, 371 U.S. 415, 437 (1963).

spurred the creation of a market-based legal mythology in post-war America. During the Cold War the United States became the confident exporter of markets and ideology, shuttling our goods, political values, and market-inspired legal language worldwide to combat the perceived tide of Soviet Communism.[224] The saturation of legal scholarship with economic thought contributed to the prevalence of market-based vocabulary in constitutional culture.[225]

Third, its resonance with American ideals made it highly adaptable to new settings. This is not to say that the images of fire and assembly are not resilient. Rather, it is to recognize that the impulse to commodify, repackage, and distribute are deeply seated tendencies in American culture.[226] In such a climate, it was seen as perfectly natural to treat expression as an economic good, and it should surprise no one that the metaphor proved to be so ferocious and expansive once political ideology and a mobilized economy became reintegrated.

The invisible market in which thought is exchanged and truth discovered has been evoked in a breathtaking array of situations. Wielding market-based concepts and images aggressively in the last four decades, the Justices have struck down laws that permitted university officials to fire "subversive" employees;[227] reinstated students who were punished for symbolically protesting the Vietnam War;[228] upheld the "fairness doctrine" over the airwaves;[229] forbidden a university from denying recognition to a student group because of its ideology;[230] protected flag burning[231] and cross burning;[232] and struck down content-based restrictions on the World Wide Web—popularly characterized as our newest "marketplace of ideas."[233]

As a more expansive vision of First Amendment liberty prevailed in the second half of the twentieth century, social forces pushed the speech-restrictive

224. Friedrich Hayek's works exploring the relationships between law and markets and arguing that economic liberty was a precondition for political freedom were published during this era. *See* F.A. HAYEK, LAW, LEGISLATION AND LIBERTY (1973); F.A. HAYEK, THE ROAD TO SERFDOM (1944).

225. Among the most influential law and economics works are GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970), Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), and RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1972). *See generally* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 77 (1996) (situating the heyday of the law and economics movement in the 1970s, nestled against "the taxpayer's revolt, the New Right, and cultural conservatism").

226. Observers have remarked on American cultural receptivity to the marketplace image. *See, e.g.*, Koffler & Gershman, *supra* note 6, at 865–66.

227. *Keyishian*, 385 U.S. at 605.

228. *Tinker*, 393 U.S. at 512.

229. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

230. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1996).

231. Texas v. Johnson, 491 U.S. 397, 418 (1989).

232. Virginia v. Black, 538 U.S. 343, 357 (2003).

233. Reno v. ACLU, 521 U.S. 844, 852 (1997).

form of the fire motif toward obsolescence.[234] Initially, the anti-totalitarian project spurred the construction of pro-regulatory symbols and doctrines, but it eventually gave way to a groundswell of concern for economic and individual liberty, and greater official tolerance of new forms of social activism. This environment nurtured the assembly and market metaphors and invited the reinvention of the mythology of fire.

From a perspective within the formal legal system, fire-themed language evolved as jurists confronted new doctrinal demands and priorities. A full arsenal of pro-speech metaphors and sayings better suited the goals of Justices set upon enlarging individual freedoms in and monitoring the boundaries of the public domain, new technologies, and diverse forms of political and social interaction.[235]

Seen in yet a third light, the conceptual devices struggled for primacy in our constitutional imagination, drawing new acolytes and exploiting new avenues for growth. In much the same way that judicial liberals first perpetuated the market metaphor to advance constitutional principles of concern to the left, so too, conservative jurists later deployed market-oriented metaphors and assembly-based images to pursue matters of concern to the right, leading to "ideological drift" in the law.[236] This see-saw dynamic in constitutional language spurred further cognizance and utilization of these rhetorical tools, ultimately entrenching them more firmly in our constitutional lexicon.

Each explanation emphasizes a different but essential feature of constitutional lawmaking: the symbiotic interaction between the doctrinal (explicit) and symbolic (implicit) realms of law; the state of constrained freedom in which jurists, litigants, and political actors instrumentally deploy language; and the influence of existing trends on the form and path of judicial utterances.

Fire's renewal in free speech culture illustrates both the patterned quality of constitutional language and the ingenuity with which legal rules and metaphors can be re-imagined. To this day, the Court continues to prefer the negative characteristics of fire—its fear-inspiring nature and its tendency to consume everything in its path.[237] And yet, initially composed to play a tune of judicial modesty in response to state regulation, fire was eventually rearranged to promote judicial centrality, or a Court-centered view of society.

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234. Although the "fire in a crowded theater" incantation has maintained its vitality as a speech-restrictive device, it rarely prevails. *See supra* note 60. It is certainly possible, of course, that the early version of the fire metaphor could be reinvigorated after another period of social trauma.

235. *See supra* Part III.C.

236. Recent deployments of the "marketplace of ideas" can be found in such diverse cases as *44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996) (overturning ban on advertising the retail price of alcoholic beverages), and *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831 (1996) (finding that denial of university funds to a student group for a religious publication constituted viewpoint discrimination). "Ideological drift in law means that legal ideas and symbols will change their political valence as they are used over and over again in new contexts." J. M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 871 (1993).

237. *See infra* Part IV.B.

It is impossible to know what the fates have in store for this surprisingly resilient constitutional metaphor. Nevertheless, fire's rebirth in free speech folklore ushers in a period in which all three metaphors have returned to active service in our constitutional lexicon.

B. A PORTAL TO THE CONSTITUTIONAL DEMI-MONDE

It might be tempting to think of each of the active speech metaphors as embodying a self-contained view of the First Amendment; after all, this is how many of us think about the First Amendment as we debate which unifying themes should guide the demarcation of its protective sphere. But it would be a grave mistake to do so. It is certainly true that two of the three—the assembly and the market—appeal to enduring ideals of American citizenship and governance. Nevertheless, only one of the three—the assembly—has solid textual foundation. Standing alone, each can aspire to be no more than an incompletely theorized conception of the First Amendment.

For the marketplace metaphor serves equally well the advocates of broad judicial restraint *and* those who envision the Court as a kind of New Deal regulator that intervenes intermittently to guard against market failure.[238] It can convey freedom, space, order, neutrality, autonomy, and exchange. In the hands of a constitutional actor who would take the metaphor literally (and completely), it is apt to denote servitude, powerlessness, chaos, wealth inequality, coercion, and raw political power.

In many respects, the assembly metaphor better captures the republican nature of our constitutional order and the socially productive potential of citizen mobilization. It evokes the democratic spirit: the possibility of growth in the law. Yet it, too, is unfinished. By itself, it tells us next to nothing as to when a raucous crowd should be treated as a lawful gathering or a dangerous mob. And there is nothing inherent in the ideal that prevents its application to situations far removed from political activity.

Fire is perhaps the most mercurial artifice of all. In its pro-speech form, it signifies the beneficial features of speech, rousing others to thought, debate, or action; in its pro-regulation identity, it illustrates the dangerous consequences of unconstrained liberty to say what we desire, wherever and whenever we please.

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238. Although Cass Sunstein has assailed the marketplace metaphor as woefully inadequate in its laissez-faire incarnation, his plea for a New Deal for the First Amendment draws upon another version of the metaphor, influenced by the New Dealers' economic philosophy. *See* SUNSTEIN, *supra* note 5, at 30, 32 (arguing that the pre–New Deal Court (and society) treated the existing distribution of resources as "prepolitical and presocial" and that New Dealers believed that laissez-faire government simply reinforced "existing distributions [that] were sometimes inefficient or unjust"); *see also id.* at 251 ("[O]ur existing 'markets' in speech are in many ways a Madisonian failure."). Recent decisions in the area of campaign finance have embraced the role of limited market regulator. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93, 210–11 (2003); Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 154 (2003); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 810 (1978) (White, J., dissenting) ("Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas.").

Unlike the market or the assembly, which are so often linked to fixtures of American political ideology, fire has been tied to no particular legal or political construct.

Trying to impose a unitary metaphor upon this body of norms is not merely a linguistically hopeless endeavor, it is also a jurisprudentially suspect one. A constitutional culture that is the picture of health is not one in which a single metaphor or image predominates, but one that tolerates a number of metaphors jousting for primacy without ever achieving it. This is as it should be. No single metaphor can possibly capture the full range of First Amendment commitments.

Although my focus has been on symbolic processes, it is well worth emphasizing that doctrine and myth go hand in hand. One is nothing without the other. Just as doctrine could not exist without the more free-flowing elements of constitutional folkways, so too would metaphor divorced from doctrine be doomed to wander the land aimlessly, without principle or purpose. Each derives content and legitimacy from its association with the other.

Far from embodying a self-contained theory of the First Amendment, free speech metaphor is better understood as a fusion of social realms and experience.[239] The domain of the known comprises past legal and political commitments, traditions, and forms of life. The unknown encompasses what the future holds for the interpretive byways taken and the routes that are bypassed. Armed with metaphor, a device that mediates past and present, we are able to stride confidently into the future.

In ritually filtering unfamiliar circumstances through legal conventions, constitutional metaphor serves several functions. It organizes the way we view a particular controversy and its stakes by concretizing the otherwise hopelessly abstract quality of legal authority; it lays the cognitive groundwork for the assertion of state influence; and, ultimately, it encourages us to accept the authority of the governmental speaker.

Above all, legal metaphor's performativity grants access to the deepest recesses of American cultural existence, where our oldest folk theories of social and political life romp and merry-make. This is the demi-monde that the external face of the law denies because its forces are unruly and sometimes regressive, yet it serves as an essential source of the law's dynamism, its majesty, and its continuing relevance. In the absence of principled rule-making, we would be left without guidance or any semblance of order. But bereft of a healthy constitutional lore, we would not long have a faithful vision of law that can arouse the senses and command our allegiance.

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239. TURNER, *supra* note 8, at 29 (describing metaphor as "interact[ive]"); *see also* ROBERT A. NISBET, SOCIAL CHANGE AND HISTORY: ASPECTS OF THE WESTERN THEORY OF DEVELOPMENT 4 (1969) ("Metaphor . . . is, at its simplest, a way of proceeding from the known to the unknown. . . . Metaphor is our means of effecting instantaneous fusion of two separated realms of experience into one illuminating, iconic, encapsulating, image.").

C. METAPHOR'S RELATIONSHIP TO JUDICIAL CENTRALITY

It is time to tease out a thread of argument that has darted in and out of the narrative, which is that free speech metaphors have had a sizeable hand in the rise of judicial supremacy—or what I prefer to call judicial centrality. By judicial centrality, I mean the popular but in no way populist notion that courts are the primary source of constitutional lawmaking, and that their conception of our legal order ought to govern how other independent actors behave. But I also mean something more, a phenomenon that is harder to pin down, a general attitude that manifests itself in rhetorical style as much as substantive outcomes. This orientation, which can be detected in the Justices' writings of late, holds that the Court should, and does, serve as the primary guardian of legal culture. It reveals itself not only in bold resort to Court-centered language, but also in an increased concern for how the institution is perceived in popular culture.[240]

The attitude is especially pronounced in the First Amendment domain. Over the years, free speech culture has become one of the deepest reservoirs of institutional influence available to the Supreme Court. These days, First Amendment mythology is more expansive and flexible than its counterparts, more comfortably employed by jurists, and least likely to instigate a backlash.

Even as the Court has systematically advanced a putative federalism agenda, it has not left First Amendment law intact, but has instead expanded its parameters and the array of associated symbols. State laws and local ordinances continue to be struck down amid a bevy of expansive free speech rules, ringing rhetoric, and dazzling images.[241] All of this suggests that the whole of First Amendment culture—its endurance, its flexibility, its capacity to promote popular support for judicial centrality—has been integral in serving other elements of the Court's agenda. Two recent clues to this end can be found in *Legal Services Corporation v. Velazquez*,[242] in which the Court expanded its sphere of influence under Article III by treating legal argumentation as sacrosanct, and *Lawrence v. Texas*,[243] where the Justices spliced together disparate interests in speech, thought, and sexuality in their reconstruction of the right to privacy. In both decisions, free speech mythos fortified doctrinal innovations in other areas of law.

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240. The Court's remarkable public hand-wringing over its cultural legitimacy in *Planned Parenthood v. Casey* certainly reflects this attitude. 505 U.S. 833, 865 (1992) ("The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands"). Additionally, I have elsewhere suggested that discussions of the effect of legal rules on the availability of cultural fare reveals a concern for popular perceptions of the Court. *See* Tsai, *supra* note 26, at 94-95.

241. *See* Tsai, *supra* note 26, at 86, 92-98 (analyzing volume of Supreme Court's activity in the First Amendment area and noting the breadth of judicial rhetoric). For an excellent discussion of other "quiet fronts" complicating, if not undermining, the Rehnquist Court's commitment to federalism, see Richard Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

242. 531 U.S. 533 (2001).

243. 539 U.S. 558 (2003).

Metaphor has played a major part in this profound shift in the Justices' own institutional outlook, just as it has deeply influenced how ordinary Americans perceive the Court's labors. Whether as the metaphoric market regulator, firefighter, or referee, the Court has built an arsenal of images, metaphors, and story lines with which to patrol its sphere of influence. Bit by bit, controversy by controversy, the Court has dispensed its prestige with exceeding discretion, giving way when it must but annexing constitutional territory where it can.

Consequently, the Justices have drawn much of constitutional life within their orbit. Legal language reflects this development, taking on a distinctly juricentric cast. Appreciating the ways in which the Supreme Court has employed metaphor to consolidate its authority should not disable us from critiquing the state of our legal culture. Where they appear with regularity in a single form, juricentric metaphors have several vices: they leave insufficient room for disagreement, send confusing signals to non-judicial actors about their roles in higher lawmaking, and threaten to choke off the lifeblood of the law.

In *R.A.V.*, for example, the Justices' depiction of a burning cross igniting the constitutional order had a ripple effect, threatening to unravel the ties between communities of color and governing institutions. The Court's glib characterization of cross-burning in a black family's yard as nothing more than "reprehensible" speech, as one among many disfavored ideas in the marketplace, dismayed legal observers and citizens alike.[244] It denied the speech-act's historical and sociological dimensions as an effective implement of racial control and cleansing.[245]

More troubling still, free speech metaphors have been used by the Court to temper efforts by cities and states to enact what the Court deemed to be non-traditional civil rights laws. In *Boy Scouts of America v. Dale*,[246] the Justices approved the Scouts' right to exclude a gay leader by carving out an exception to New Jersey's public accommodations law based on the right to association—itself an extension of the right to speak freely and assemble peaceably for redress.

But in activating a radiant vision of the assembly on behalf of the Boy Scouts alone,[247] the Justices obscured the fact that the civil rights law under review

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244. *See, e.g.*, MACKINNON, *supra* note 216, at 34 (noting that the opinion does not mention the Klu Klux Klan once, and describing the Court's treatment of cross-burning as displaying "bland indifference to reality"); Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the R.A.V. Case*, *in* WORDS THAT WOUND 134–35 (Mari J. Matsuda et al. eds., 1993) (criticizing *R.A.V.* ruling for minimizing social impact of cross burning and state's regulatory interests).

245. Perhaps in recognition of the corrosive quality of callous judicial language, Justice O'Connor's opinion in *Virginia v. Black* stressed the deeply anti-republican nature of the typical cross burning, acknowledging it as a "tool of intimidation and threat of impending violence." 538 U.S. 343, 354 (2003).

246. 530 U.S. 640 (2000).

247. This image of the rally was fashioned through the Court's repeated invocation of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), which involved a St. Patrick's Day parade, and through the invocation of *Brandenburg*, which involved an explicitly

was itself the product of mobilization and collective deliberation. And in looking askance at the New Jersey enactment,[248] they subtly imposed their own, static conception of civil rights legislation on the law, thereby discouraging innovative efforts to advance the equality principle. One of the great ironies of the outcome, then, was that the picture of the unpopular private association struggling for equality under the law, borrowed from an era of intense social resistance, was deployed in the cause of a mainstream organization that pursued no particular external message of reform, but merely sought to expel a gay member from its midst. Not only is this prototype of "the people" more alive than ever, if pressed too far it threatens to hamper innovative, good-faith efforts by public officials to enforce other constitutional principles.

The history of the language of fire offers a few intriguing lessons. As much as one might applaud the Court's ringing defense of principle in *ACLU v. Reno* or *Texas v. Johnson*, the strident cry against would-be constitutional arsonists should give more detached observers pause. If we were troubled that the early speech-as-fire regimes encouraged less sensitivity to First Amendment values, we should be equally concerned that an alarmist regulation-as-fire field could lead to a general overprotection of speech, tying the hands of government in the face of complex social ills.

A more pressing risk, however, is what Turner called the "self-certifying myth":[249] secure in the knowledge that the judiciary will raise the alarm if they go too far, and demonized by judges even when their intentions are honorable, lawmakers might begin to pay less attention to the limits of their authority. Recall that both the pro-regulation and pro-speech formulation of the fire metaphor minimize the duties of the state to faithfully enforce free speech values. How many public officials would take measures to prevent constitutional conflagrations if they were repeatedly reminded that a professional class of firefighters stood ready to tackle the problem on a moment's notice?

Even if this attitude produces only incremental incursions, the net result could be more, rather than fewer, brush fires to put out. Such a development might not keep us awake at night, except that a great number of First Amendment matters routinely escape the attention of the courts. Vigilance and good sense on the part of elected leaders are indispensable.

Consider, too, the fact that the myth of fire has long cast the citizenry as comparatively passive actors. Does the metaphor not obscure our own responsibilities to engage in self-help by avoiding distasteful expression; to interact with

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anti-black, anti-Jewish rally. *See Dale*, 530 U.S. at 661. The Court in *Dale* seized the mantle of the protector of unpopular opinions by citing the flag-burning case and referring to coerced speech decisions.

248. According to the Court: "State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains. . . . Over time, the public accommodations laws have expanded to cover more places. New Jersey's statutory definition of '[a] place of public accommodation' is extremely broad." *Boy Scouts*, 530 U.S. at 656.

249. TURNER, *supra* note 8, at 29.

our public officials on matters that implicate speech values; and to hold leaders accountable when they fail to strike the right balance between expediency and principle?

None of this is to suggest that the government or citizenry will bow to this court-centered view of the legal order without a fight. And yet the cues given to constitutional actors through language affect the quality of the performance, the timing and sequence of legal change, and even the strength of our commitment to founding ideals. If we take seriously the polyphonic model of law, and if we accept that metaphor perpetuates conceptions of legal duty as well as power, then linguistic signals emphatically *should* matter. It follows that we ought to monitor the path of metaphor with every bit of the diligence, wonder, and concern that we reserve for the rest of the law.

CONCLUSION

We end where we began. Metaphor surely will not be the cause of the law's undoing. Nor does it tell us everything we need to know about how our substantive commitments will be honored. But what it does reveal about the formation of constitutional culture is considerable. Metaphor is at once the first step in a complicated dance over institutional prerogative and legal meaning, the symbolic union of communitas and the democratic spirit, and the embodiment of our innermost hopes and fears as members of the American polity.

Originally conceived in the throes of war and the prospect of revolution, the metaphor of fire eventually became unmoored from its historical situs. Ingeniously retrofitted at every turn, this culture-bearing device served mostly a speech-restrictive function early on, then was reprogrammed and pressed back into service on behalf of increasingly speech-protective tasks. Today, when the Court resorts to fire-based metaphors and sayings to call forth recurring hero myths and scripts, we instinctively feel anxious or relieved, uncertain or resolute, ashamed or proud. And as citizens, we find ourselves feeling appreciative of the judiciary's presence, even if we have a nagging concern about its looming role in social and political life.

Incremental doctrinal refinements and the interplay of frolicking metaphors have spun the complicated constitutional web of meaning in which we live. If we lean in and listen closely to the song-like qualities of our higher law, we just might hear the distant shouts, the alarm bells clanging, and the hoses spinning from their reels.